EME COURT, U. S.

No. 656

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ROSCOE L. NORMAN, ET AL.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners, Roscoe L. Norman, John E. Crowley, Sherwood E. Buckland, Maurice J. Fitzgerald, Loran E. Buckey, and John B. Martin, plaintiffs in the court below, pray that a writ of certiorari issue to review the judgment of the United States Court of Claims, filed March 15, 1968, which became final on July 17, 1968, upon the denial of plaintiffs' motion for a new trial and reassignment of their cases to a different judge of said Court of Claims.

PROCEEDINGS AND OPINION BELOW

The six cases involved herein were filed separately, were consolidated for hearing by a Commissioner of the Court below on his own motion, and were heard by him at Washington, District of Columbia, on January 19, 20 and 21, 1966. The Commissioner filed a report on Febru-

ary 2, 1967, containing a "Memorandum Opinion", findings of fact and a recommended conclusion of law. On June 5, 1967, the six plaintiffs, by counsel, filed exceptions and objections to the Commissioner's Report and a 48 page brief in support thereof. Government counsel filed a brief in opposition on August 9, 1967.

The cases were argued before the Court of Claims on December 6, 1967, and on March 15, 1968, the Court filed a 48 page opinion containing a so-called "Conclusion of Law" "that plaintiffs are not entitled to recover" and "their petitions are dismissed."

On May 16, 1968, plaintiffs filed a motion for a new trial and reassignment of their cases to a different judge of the Court of Claims. On July 17, 1968, the Court of Claims denied that motion.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1255(1).

QUESTIONS PRESENTED

The questions to be decided are new, arise under a new and unusual statute not previously construed by any court, and are as follows:

1. Unconstitutionality of Section 10 of the Act of July 12, 1960, Public Law 86-616, 74 Stat. 395, a temporary statute, commonly referred to as the "White Charger Act", for failure of the Congress to provide standards for the exercise of Congressional discretion conferred on the Secretary of the Air Force only; denial to plaintiffs of their constitutional rights of due process of law, including a hearing, confrontation, cross-examination, and representation by counsel; and because enactment thereof was procured by the United States Air Force by misrepresentations made to the Congress.

2. The decision by the United States Court of Claims of a federal question of substance not previously determined by this Court.

3. The decision by the United States Court of Claims of an important question of federal law which should be settled by this Court.

4. The decision by the United States Court of Claims in these cases so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's powers of supervision.

5. Whether Section 10 of the Act of July 12, 1960, a temporary statute, has the effect of suspending or temporarily repealing Sections 8916 and 8921 of Title 10, United States Code, permanent statutory provisions, vesting in plaintiffs the right to remain on active duty for 28 years as lieutenant colonels and 30 years as colonels in the regular United States Air Force.

(For the convenience of this Court, the statutes mentioned in this paragraph and the opinion of the Court below are printed in the appendix hereto)

6. The unlawful delegation by the Secretary of the Air Force of Congressional discretion conferred on him only by said Section 10 of the Act of July 12, 1960, thus rendering the premature mandatory retirement of plaintiffs void and ineffectual.

The foregoing questions are discussed in the following pages of this petition.

STATUTES INVOLVED

Section 10 of the Act of July 12, 1960, Public Law 86-616, 74 Stat. 395.
Section 8916 of Title 10, United States Code
Section 8921 of Title 10, United States Code
Section 8963 of Title 10, United States Code

STATEMENT OF THE CASES

The six plaintiffs involved herein were lieutenant colonels and colonels in the Regular United States Air Force who accepted their appointments with the intention of making service in the Air Force their careers and of remaining on duty until they became entitled to retirement for length of service. By statutes in force at that time the terms of office of lieutenant colonels and colonels were 28 and 30 years respectively. Plaintiffs served honorably, faithfully and to the entire satisfaction of their superior officers for more than 20 years, but were retired mandatorily under Section 10 of the Act of July 12, 1960, the enactment of which, as hereinafter shown, was procured by misrepresentations and misstatements made to the Congress by the Air Force. Plaintiffs' premature forced retirements resulted in materially reduced incomes at a time when maximum incomes were necessary for the support of their families, education of their children, and discharge of other necessary financial obligations.

REASONS FOR GRANTING THE WRIT

1. The statute involved (Sec. 10, Act of July 12, 1960) is unconstitutional and should have been so found by the Court of Claims.

2. The questions to be decided are new and arose under a new and unusual temporary statute not previously construed by any court; namely, Section 10 of the Act of July 12, 1960.

3. The Court of Claims has decided federal questions of substance not theretofore determined by this Court, but which should be settled by this Court.

4. The decision below constitutes such a departure from the usual course of judicial proceedings as to call for the exercise of the powers of supervision of this Court.

5. Even if the statute should be found to be constitutional, the Secretary of the United States Air Force unlawfully attempted to delegate Congressional discretion conferred only upon him without authority from the Congress therefor.

1. The White Charger Statute is Unconstitutional.

Section 10 of the Act of July 12, 1960, is unconstitutional and void because (1) it attempted to confer on the Secretary of the Air Force the legislative discretion to reduce the strength of the Air Force by the retirement mandatorily of permanently commissioned officers of the Regular Air Force before completion of their statutory tenures of office without prescribing any standards or methods of selecting such officers and without affording them any of the usual constitutional rights of a hearing, confrontation, cross-examination or representation by counsel. Under the terms of the statute as enacted, the Secretary of the Air Force could retire mandatorily the youngest, the oldest, the tallest, the shortest, the thinnest or heaviest officers, or all graduates of a particular college, or those with blue eyes, who had served at least 20 years and had been passed over for promotion more than twice.

Legislative standards for the exercise of delegated legislative discretion are essential to the validity of such a statute.

Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241, 72 L. Ed. 446 (1935)
Schechter Poultry Corp. v. U. S., 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935)
State Board of Milk Control v. Newark Milk Co., 118 N. J. 504, 521, 522; 179 A. 116, 125 (1935)
Veix v. Seneca Bldg. & Loan Assoc., 126 N. J. L. 314, 321, 19 A. 2d 215 (1941)
State v. Traffic Telephone Workers Federation, 66 A. 2d 616 (N. J. Sup. Ct. 1949)

2. New Statute and New Questions Involved.

Section 10 of the Act of July 12, 1960 (74 Stat. 395), a temporary statute, constitutes a radical legislative departure from usual statutory provisions of a somewhat similar nature, because it purported to vest in the Secretary of the Air Force the temporary authority and power summarily to retire commissioned officers of the Regular United States Air Force of the ranks of lieutenant colonel and colonel as being marginal, marginally effective, unsatisfactory or substandard before they had served their terms of office fixed by permanent statutes without affording such officers the requisite constitutional rights of a hearing, confrontation and cross-examination.

By Sections 8916 and 8921 of Title 10, United States Code, lieutenant colonels and colonels were required to serve at least 28 and 30 years, respectively, before becoming entitled to retirement for length of service. In other words, their statutory terms of office were 28 and 30 years. Plaintiffs were summarily and mandatorily retired at reduced retirement pay before completion of their terms of office.

3. Federal Questions of Substance Are Involved.

Plaintiffs maintain that they had vested rights in their offices of which they could be deprived only by due process of law. Where an officer's tenure of office is fixed by statute, as here, before he can be deprived of his office against his will, he is entitled to a hearing, to be represented by counsel, to be confronted by his accusers, and to cross-examine them, as well as to exercise the right to challenge members of the hearing agency or court. Plaintiffs were denied all such rights.

Confrontation and cross-examination are "vital when one's employment rights are involved".

> Greene v. McElroy, 360 U. S. 474, 496 (1959)
> Beard v. Stahr, 370 U. S. 41, 43 (dissenting opinion) (1962)

Williams v. Zuckert, 371 U. S. 531, 534, cert. granted on rehearing 372 U. S. 765 (1963)
Barnes v. Northwest Airlines, 233 Minn. 410, 433, 47 N. W. 2d 180, 193 (1951)
Symons v. Klinger, 372 F. 2d 47 (9th Cir.), cert. denied 386 U. S. 1040 (1967)
Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318 (1968)
Barber v. Gladden, 385 U. S. 363, 364 (1966)
Fletcher v. U.S.Ct. Cls. No. 386-65, decided March 15, 1968

The right of confrontation is "one of the fundamentals of life and liberty".

Kirby v. U. S., 174 U. S. 47, 55, 56 (1899)

Plaintiffs' interests in their employment were entitled to constitutional protection.

United Public Workers v. Mitchell, 330 U. S. 75 (1947)
Weiman v. Updegraff, 344 U. S. 183 (1952)
Slochower v. Board of Higher Education, 350 U. S. 551 (1956)

"Vested rights may be created by common law, by Statute, or by contract. No matter how created they are entitled to the same protection."

11 Am. Jur. 1200, Sec. 371, 16 Am. Jur. 2d 762, Sec. 422.

Plaintiffs' rights to remain on duty for 28 and 30 years were created by statute and plaintiffs could be deprived thereof only by due process of law. As stated above, they were denied due process of law.

Following the First World War, the Army was overstaffed with commissioned officers. Authority was requested of the Congress to reduce the commissioned strength of the Army. The Congress enacted the Act of June 4, 1920, 41 Stat. 758, 773, Sec. 246, which provided for placing Army officers in Classes A and B. Those in Class A were to be retained in the service, and those in Class

B were to be eliminated. In enacting that statute, Congress carefully safe-guarded the rights of such officers by authorizing them to show cause as to why they should not be eliminated from active service, to have a formal hearing before a Court of Inquiry, to appeal their cases to the Secretary of War and then to the President. We contend that the least that should have been granted to plaintiffs was a hearing, the rights of confrontation and cross-examination, and representation by counsel. Constitutional rights certainly are federal questions of substance, are involved in plaintiffs' cases, and this Court properly should settle those questions.

4. The Decision Below Departs From the Usual Course of Judicial Proceedings.

As we have shown above, plaintiffs were denied the constitutional rights of a hearing, confrontation and cross-examination before their mandatory premature retirements were effected.

Prior to during, and after 1958, the Department of the Air Force sought legislative authority for the elimination from the active list by mandatory retirement of a "small number" of "marginal", "marginally effective", "unsatisfactory" and "substandard" lieutenant colonels and colonels.

To procure enactment of such legislation, the Department of the Air Force represented to the Congress that it expected to eliminate about "a hundred (such officers) and then their problem will be solved"; "it is our hope to use this permissive legislation, if passed, very sparingly to eliminate only the very bottom in these grades"; "Therefore, in the interest of good personnel management, the Air Force would like the authority to involuntarily retire a certain few of these officers". "Based upon an examination of the records of the officers concerned, it is estimated that from 100 to 200 permanent lieutenant-colonels will be retired the first year." "In this grade

(colonel) the proposed law limits the number who may be involuntarily retired to 20 percent of those considered. This means that 40 would be the maximum number that could be eliminated in any particular year. Based on an examination of the records of these officers, it is estimated that approximately 25 would be retired the first year." "The primary purpose of this (legislation) is to give us a management tool to eliminate from the service marginally effective officers." "* * * we currently think we would probably eliminate 25 colonels." "* * * we have today approximately 600 permanent colonels serving in the active grade of colonel. "* * * if this legislation were passed we would involuntarily retire 25".

> (See Transcript of Hearing before a Subcommittee of the Committee on Armed Services, United States Senate, on S. 1795, June 17, 1959, Pages 16, 39, 40, 41, 42)

The evidence in the record before the Court of Claims and this Court conclusively and definitely shows that each of the plaintiffs was classified by superior officers under the Air Force's rating system as "A Very Fine Officer of Great Value to the Service", the rating category next to the highest used. None of the plaintiffs was classified or characterized as "marginal", "marginally effective", "substandard" or "unsatisfactory."

Instead of retiring 25 colonels and 100 to 200 lieutenant colonels the first year, the Air Force, less than seven months after passage of the White Charger statute, actually directed the retirement of 120 colonels and 375 lieutenant colonels, nearly five times the number of colonels and three times the number of lieutenant colonels which the Air Force represented to the Congress it wanted to retire. The Air Force deliberately misled the Congress into enactment of Section 10 of the Act of July 12, 1960. (Commissioner's Memorandum Opinion, pp. 19-20)

The court below failed to give any weight to the actions of the Air Force in procuring enactment of the White Charger statute by misrepresentations.

In the second paragraph on Page 2 of the opinion of the Court below, the following appears:

> "* * * The Act permitted early mandatory retirement of not to exceed 20 per cent of officers in the military service in the grade of permanent colonel and an unlimited number of permanent colonels with 20 years or more of service who had been considered for promotion twice, but not recommended."

Those statements are erroneous in several respects. The pertinent provisions of the so-called White Charger Act, (P.L. 86-616, 74 Stat. 395) are as follows:

> "(a) Not more than once in each fiscal year, the * * * Secretary of the Air Force may convene one or more boards, * * * to review the records of, and recommend for continuation on the active list, officers * * * in the regular grade of colonel or lieutenant colonel who have at least 20 years of service * * * and who have been considered more than twice but not recommended for promotion * * *.
>
> "(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board convened under this section * * * in the Air Force, the number specified by him for officers in any category must be at least 80 per cent of the officers in that category being considered. * * * (See pp. 5 and 6 of Court's opinion where pertinent provisions of the Act appear).

Accordingly, it is self-evident that the statements in the Court's opinion that the Act permitted early mandatory retirement of not to exceed 20 percent of officers in the grade of permanent colonel and an unlimited number

of permanent colonels with 20 years or more of service who had been considered for promotion twice are incorrect and inaccurate. The officers subject to mandatory retirement included both colonels and lieutenant colonels and was limited to such officers with at least 20 years of service who had been passed over for promotion three or more times. Furthermore, the limitation of 20 per cent applied to boards subsequent to the first board convened under the act. (Third sentence of Par. (b) of Sec. 10 of Act, beginning in 4th line). An unlimited number of officers might have been specified for continuation on the active list by the Secretary for the first board, after which the number specified must have been at least 80 per cent of the officers in a particular category. The Act further provided that

> "* * * if the Secretary approves the report of a board, he shall, not later than the first day of the seventh month beginning after he approves that report, retire each officer who is considered but not recommended for continuation."

Also, the statement in the opinion of the Court below to the effect that the Act applied to officers "who had been considered for promotion twice" but not recommended, is incorrect. The Act provided that it related to officers "who have been considered more than twice." (Last two lines of Par. (a) of Sec. 10). "More than twice" means at least three times and not twice, as stated in the Court's opinion.

Plaintiffs filed a motion for a new trial and reassignment of their cases to a different judge on May 16, 1968, in which they carefully pointed out the erroneous portions of the Court's opinion, but the Court denied that motion without comment. The Court's decision, therefore, constitutes a radical departure from the usual course of judicial proceedings. Practically all courts are meticulous and careful to avoid inaccuracies and misstatements of fact and law in their opinions. An inaccurate opinion under-

mines the respect for and confidence in the court which both lawyers and litigants usually have for judicial decisions. Furthermore, the glaring inaccuracies mentioned above indicate a careless and superficial examination and reading of the statute involved.

In addition to the erroneous statements mentioned above, the Court's opinion, in the last paragraph on page 3, contains the statement that "responsible officials of the Air Force became concerned as to the quality of service of some of these senior officers", etc.

There is absolutely no evidence in the record in these cases that any "responsible" or other "officials of the Air Force" or any other component of the Armed Services of the United States became concerned as to the quality of the service of any of the six plaintiffs in these proceedings. On the contrary, each was, as already stated, rated as "A Very Fine Officer of Great Value to the Service" and in a number of instances as "Outstanding". Therefore, the statements quoted above have no proper place in the opinion of the Court below, and constitute an unjust, unsupported reflection upon sincere, upright, competent and efficient officers of high calibre, who served with distinction in peace and war. The Court below, therefore departed from the truth, contrary to the usual course of judicial proceedings.

Again on page 5 of the Court's opinion there are quotations from the 1957 report of the Cordiner Committee on Professional and Technical Compensation, including the following:

> "* * * Having failed of selection for promotion and being in the sanctuary of this provision, these officers have not continued to produce with customary effectiveness. * * *" (about middle of page).

Those words have absolutely no application to plaintiffs. On the contrary, the only evidence before the Court below conclusively shows that all of the plaintiffs con-

tinued to perform their duties up to the very hour of their mandatory retirements in a manner entirely satisfactory to the superior officers under whom they served, as well as their contemporaries. In this respect the Court's opinion again departs from the usual course of judicial proceedings. The portions of the opinion quoted above improperly and unjustly reflect upon the plaintiffs and should be deleted therefrom.

Furthermore, at page 7 of the opinion of the Court below are found inaccuracies believed to call for the exercise of the supervisory powers of this Court. There the case of Charles L. Andrews et al. v. United States, 175 Ct. Cls. 561 (1966) is cited as an applicable precedent in these proceedings. That case is not an applicable or persuasive precedent in the cases involved here. In that case, the plaintiffs had served the full period of time required by the Uniform Pay Act of 1963. In the present cases, plaintiffs' statutory periods of service were cut short by their mandatory retirements, they were deprived summarily of the right to serve the periods fixed by the applicable statutes, and their rates of retired pay were materially reduced thereby.

Certiorari should be granted by this Court and the Court below should be directed to eliminate from its opinion all reflections upon the character of the service of plaintiffs.

5. Does Temporary Statute Repeal or Suspend Permanent Statutes?

This seems to be a novel question. The situation in these cases suggests the query whether Section 10 of the Act of July 12, 1960, which had a life of five years and expired July 12, 1965, by implication, repealed or suspended Sections 8916(a) and 8921(a) of Title 10, United States Code, permanent statutory provisions which have been in effect for 20 years. (Act of August 7, 1947, 61 Stat. 605). Section 10 contains no language even sug-

gesting that a repeal or suspension of the provisions of Sections 8916(a) and 8921(a) of Title 10 was intended. Construing all three statutory provisions together and giving effect to all seems to be impossible. Therefore, the permanent statutory provisions should prevail.

Repeals by implication are not favored in the law.

> State ex rel Lum v. Archibald, 43 Minn. 328, 45 N. W. 606, (1890).

Section 10 of the Act of July 12, 1960, seems to have had no actual force and effect, and that plaintiffs' retirements thereunder are wholly void.

6. Unlawful Delegation of Legislative Discretion.

Article I, Section 8, of the Constitution of the United States provides that all legislative powers granted are vested in the Congress, and that the Congress shall have power "To make Rules for the Government and Regulation of the land and naval Forces." No other agency, department or officer has any authority or power to increase, reduce or otherwise affect the strength of the military forces of the United States unless empowered by appropriate Congressional legislation to do so.

In enacting Section 10 of the Act of July 12, 1960, the Congress, as heretofore pointed out, did not prescribe any standards for the selection of the officers to be retained on the active list or those to be retired mandatorily, and did not authorize the Secretary of the Air Force to delegate to anyone else the legislative discretion conferred upon him by said Act to reduce the strength of the Air Force by mandatorily retiring commissioned officers. The Act specifically and definitely provides that

> "(a) * * * the * * * Secretary of the Air Force may convene one or more boards * * * to review the records of, and recommend for continuation on the active list, officers of that component * * *.

"(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary * * *.

"(c) * * * if the Secretary approves the report of a board, he shall * * * retire each officer who is considered but not recommended for continuation."

Notwithstanding the fact that the statute limited the power and authority to convene selection boards and to specify the number of officers to be continued on the active list to the Secretary of the Air Force, and did not authorize him to delegate either of those powers to others, the selection board which considered plaintiffs' cases was appointed by the Assistant Vice Chief of Staff of the Air Force. The order of the Air Force appointing a "Screening Board", the board "to review the records" of officers, despite the statement therein that "the law requires that the Secretary of the Air Force specify the exact number to be continued on active duty", directed that "The Letter of Instructions to the Central Board will, * * * delegate to the Deputy Chief of Staff, Personnel, authority to specify for the Secretary of the Air Force the exact number in each group to be continued on active duty * * *". The order appointing the selection board directed that "Within the percentages specified above, the Deputy Chief of Staff, Personnel, shall establish for the Secretary of the Air Force * * * the exact number of officers in each grade to be selected for continuation on the active list * * *". Since the statute did not confer the power on the Secretary to delegate his discretionary authority and power mentioned above, it would follow, as a matter of course, that all acts performed under delegated powers are void, and plaintiffs' retirements likewise are void.

In the case of Cudahy Packing Co. v. Holland, Administrator of the Wage and Hour Division, Department of Labor, 315 U. S. 357, 363, 367; 86 L. Ed. 895, 899, 901, 902 (1942), this Court had before it for consideration "the narrow but important question as to the power of

the Administrator to delegate his power to issue a subpoena." In deciding that question, this Court, among other things, said

> "The Act does not define the Administrator's power to issue subpoenaes or specifically authorize him to delegate it to others * * *
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred:"

This Court held that a subpoena duces tecum signed by a person other than the Administrator was void.

No logic is required to determine which is the more important, the issuance of a subpoena for the appearance of a witness before an administrative body making an investigation and directing the witness to bring along some documentary evidence, or an exercise of the discretionary determination of how many military officers shall have their careers in the armed forces abruptly ended and their financial affairs disrupted, officers who served their country honorably, faithfully and efficiently in war and peace for more than 20 years and who could not be promoted because of lack of vacancies. The mere statement of the question prompts the answer. The determinations made under attempted delegations, we contend, are void and the retirements of plaintiffs likewise are void.

CONCLUSION

Since the judgment of the United States Court of Claims relates to and purports to decide questions of law not previously considered and decided by any court; since the Court below departed from the usual course of judicial proceedings; since plaintiffs were prematurely and mandatorily retired under and as a result of unlawful delegations of Congressional discretion; and since the

decision below is defective for the other reasons stated herein, this petition for writ of certiorari should be granted.

Respectfully submitted

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IN THE UNITED STATES COURT OF CLAIMS

(Decided March 15, 1968)

No. 295-62

ROSCOE L. NORMAN v. THE UNITED STATES

No. 321-62

JOHN E. CROWLEY v. THE UNITED STATES

No. 336-62

SHERWOOD E. BUCKLAND v. THE UNITED STATES

No. 256-64

MAURICE J. FITZGERALD v. THE UNITED STATES

No. 351-64

LOREN E. BUCKEY v. THE UNITED STATES

No. 313-64

JOHN B. MARTIN v. THE UNITED STATES

Richard L. Merrick, attorney of record, for Plaintiffs Roscoe L. Norman, John E. Crowley, Sherwood E. Buckland, Maurice J. Fitzgerald and Loren E. Buckey.

Clifford A. Dougherty, attorney of record, for Plaintiff John B. Martin.

Charles M. Munnecke, with whom was *Assistant Attorney General Edwin L. Weisl, Jr.*, for defendant.

Before COWEN, Chief Judge, LARAMORE, DURFEE, DAVIS, SKELTON and NICHOLS, *Judges*.

OPINION

DURFEE, *Judge*, delivered the opinion of the court:

Each of the plaintiffs herein seeks to recover the difference between the active duty pay he would have received as an officer in the Air Force if he had not been retired early under the provisions of the so-called White Charger Act and the retired pay he has received since the date of his retirement under that Act. We conclude that none of the plaintiffs is entitled to recover.

The "White Charger Act" [1] derived its name from an observation that this legislation went through Congress "like a White Charger." The Act permitted early mandatory retirement of not to exceed 20 percent of officers in the military service in the grade of permanent colonel and an unlimited number of permanent colonels with 20 years or more of service who had been considered for promotion twice, but not recommended.

The Act took initial form in Senate Bill S. 1795 which was the outgrowth of proposed legislation submitted by the Secretary of Defense who explained its purpose to the Congress on April 20, 1959:

> The purpose of the proposed legislation is to enable the Armed Forces to meet more effectively the objective of a Regular officer corps of the highest quality in all ranks by (1) more closely relating the retention of officers after 20 years of service who are serving in the permanent grades of lieutenant colonel and colonel, commander and captain to the requirements of the services, including the degree of contribution or productivity of the officer and the needs of the services rather than solely to a "guaranteed" number of years of service; (2) according increased recognition and incentive for outstanding ability and competence; * * * and (4) *expediting the separation from the service of officers who have been twice deferred from permanent promotion.* [Emphasis supplied]
>
> * * * *

[1] Section 10 of Public Law 86-616, approved July 12, 1960, 74 Stat. 386, 395.

> It is emphasized that the present legislation is not intended to cause, and will not be used for, the involuntary removal of Regular officers from the active list solely because of a reduction in the actual or authorized personnel strength of the service concerned. Rather it is intended that the removal of Regular officers from the active list will continue to be authorized only for the reasons and under the procedures and limitations now provided by law for such removal *and as further provided by the proposed legislation.* [Emphasis supplied]

The need "to meet more effectively the objective of a Regular officer corps of the highest quality in all ranks" arose from the sudden expansion of the Regular officer corps in World War II, and again during the Korean War. The law as finally enacted was limited to the Army and the Air Force, but the principal problem of quality of service by senior officers resulted mainly from the rapid expansion in the number of Air Force officers during wartime. For example, the Regular Air Force officer corps was increased from 1,400 at the time of our entry into World War II to 23,000 after World War II and to 69,000 in 1956 after the hostilities in Korea.

As a result of this expansion, many officers were promoted rapidly for the purpose of staffing the increased number of higher grade positions. Some officers were promoted to the grade of colonel in the Air Force with 12 or 13 years of service, 10 years before they would have reached that grade in the Army or Navy. As a consequence of this rapid promotion, however, these Air Force senior officers faced many years of service in their attained rank with severely limited prospects for further promotion.

Under the Officer Personnel Act of 1947[2] lieutenant colonels could expect to continue in active service until they had completed 28 years of service (61 Stat. 905); this same expectation of continued service for colonels was until completion of 30 years of service (61 Stat. 904). During the middle of the 1950's responsible officials of the Air Force became concerned as to the quality of service of some of these senior officers in view of new and increasing requirements, and the fact that the existing law provided a sanctuary in long continued active service in grade for them.

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[2] Approved August 7, 1947, 61 Stat. 795.

Mandatory elimination by separation or retirement of deferred officers of the Army in junior grades who failed of selection for promotion, was provided by this Act of 1947. However, the only method for the elimination of officers of the grade of lieutenant colonel and colonel was for demonstrated deficiency in performance of such degree was to warrant elimination through show cause procedures, which had been largely ineffective. When used, this method had the colorable effect of stigmatizing subject officers. In April, 1956, the Deputy Chief of Personnel of the Air Force, in reviewing this problem, stated:

> The 1946 and 1947 integration program increased the Regular Officer corps to 17,500. * * *
>
> As a result, the age and experience of 12,000 of our Regular officers is concentrated in the five year bracket of officers commissioned from 1941 through 1945.
>
> * * * *
>
> With as many of our regular officers concentrated in this five year group, and with only a limited number of spaces available for promotion to permanent colonel, junior officers of this group would be mandatorily retired as lieuteuant colonel without ever competing for promotion to permanent colonel.
>
> In light of this, a plan was developed in 1953 and has been in use since 1955 which will assure every Regular Air Force Officer at least two opportunities for permanent promotion to colonel before he is mandatorily retired.
>
> * * * *
>
> Since the great majority of the eligible officers are all well qualified for promotion, the board soon realizes that in reality, they are selecting *the best of the best qualified.*
>
> * * * *
>
> In this situation *non-selection reflects in no way upon the individual qualifications of the officers concerned* or the Air Force's continued reliance on and the need for their services. [Emphasis supplied]

All of the foregoing considerations were included in the Report to the Secretary of Defense by an advisory group known as the Cordiner Committee on Professional and

Technical Compensation in 1957. This Committee noted "the Military Manpower Problem" as follows:

> The modern military manpower problem, reduced to its simplest terms, is one of quality rather than quantity. It is not merely a matter of the total number of people on hand, but is much more a matter of the level of competence, skill and experience of those people.
>
> * * * *
>
> (8) As retention of quality military personnel improves, revitalize existing personnel controls and institute new controls to accomplish the following:
>
> * * * *
>
> A stiffening of the criteria of selection for promotion and retention to insure the retention and advancement in all grades of only the highly qualified.
>
> * * * *
>
> As an example of the type of problem facing the Services in this area, there exists within each of the Services a small group of officers in grades 0-5 and 0-6 for whom this safeguard has served a purpose for which it was not intended. Having failed of selection for promotion and being in the sanctuary of this provision, these officers have not continued to produce with customary effectiveness. * * *
>
> The Committee, however, is convinced that "quality attracts quality." Therefore, a positive requirement exists for each Service to employ all administrative and legislative measures now available to them to separate from active duty the less productive officers within its officer corps. The Committee recommends that additional remedial Service legislation should be sought if found necessary in the establishment of effective personnel quality controls.

As a result of careful and thorough consideration of these considerations by Congress, Public Law 86-616, 74 Stat. 386, was enacted, and approved on July 12, 1960. In relevant part, it provided [*Id.* at 395]:

> (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers * * * in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers * * * in the regular grade of colonel or lieutenant colonel who have at

least 20 years of service * * * and who have been considered more than twice but not recommended for promotion to the next regular grade.

(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board * * *, the number specified by him for officers in any category must be at least 80 percent of the officers in that category being considered. An officer may be considered for continuation on the active list * * * only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.

(c) * * * [I]f the Secretary approves the report of a board, he shall, not later than the first day of the seventh * * * month * * * retire each officer who is considered but not recommended for continuation.

(d) A member * * * retired under this section is entitled to retired pay * * *.

(e) * * *

(f) This section is not effective after June 30, 1965.

We shall first deal with the legality of the Act itself.

Plaintiffs assert that Section 10 of the Act of 1960 is unconstitutional and void because it deprives them and other officers similarly situated of valuable rights without due process of law; is arbitrary and discriminatory, and also constitutes an unlawful delegation of legislative powers because no adequate standards are prescribed for the exercise of administrative discretion in making the determination by which regular officers are to be continued on the active list, or to be retired or discharged.

First we take up plaintiffs' claim that they were deprived of a vested right without due process of law. The alleged vested or property right is claimed by plaintiffs on the basis that they were appointed to permanent grades in the Air Force, and therefore held by statute, office with tenures fixed at 28 years for lieutenant colonels and 30 years for colonels, with vested rights to remain on duty for these periods unless retired earlier for physical disability or by other existing provision of law. Accordingly,

plaintiffs urge that they could not legally be deprived of these vested rights except by due process of law. Plaintiffs charge that their removal without hearings, right of cross examination, confrontation or challenges as authorized under the Act, is a violation of due process and therefore unconstitutional and void.

The principle is well established and there is no vested right to Federal employment or to the privileges of retirement thereby. The status of these officers was not a common law contractual relationship with the Government, but was created entirely by statute and could be altered or taken away by statute. *Bell* v. *United States*, 366 U.S. 393 (1961). This rule in *Bell, supra*, although dictum, became part of the basis for a clear holding by this court in *Charles L. Andrews, et al.* v. *United States*, 175 Ct. Cl. 561 (1966). Plaintiffs there were challenging the validity of a statute (Uniform Services Pay Act of 1963, 77 Stat. 210) which denied them their "right" to compute their retirement pay at 75 percent of *present* active duty pay. The statutory right to retirement pay had allegedly vested by virtue of the fact that plaintiffs had given the Government the bargained-for consideration, *viz.*, performance in the Armed Services for the required number of years. Our court rejected this claim of a vested or contractual right to any particular amount of retired pay under statute (175 Ct. Cl. at p. 563):

> * * * Under the plaintiffs' theory, both the 1958 and the 1963 Acts breach the contract and, therefore, are unconstitutional under the Fifth Amendment.
>
> The difficulty with this position, as defendant points out, is that there is strong authority for the counterproposition that officers have no vested or contractual right to any particular amount of retired pay. The general rule has long been that "[a] soldier's entitlement to pay is dependent upon statutory right * * * [and not upon] common-law rules governing private contracts * * *."
>
> [Citations of authority—see footnote 3 below] And since the pay of officers in the uniformed services is

[3] *Bell* v. *United States*, 366 U.S. 393, 401 (1961); *Cf Leonard* v. *United States*, 279 U.S. 40 (1929); *United States* v. *McDonald*, 128 U.S. 471 (1888); *Byrd* v. *United States*, 103 Ct. Cl. 285 (1945); *Amchanitzky* v. *United States*, 81 Ct. Cl. 409, *cert. denied*, 296 U.S. 598 (1935); *Fulmer* v. *United States*, 32 Ct. Cl. 112 (1897); *Magaw* v. *United States*, 16 Ct. Cl. 3 (1880); *Lowry* v. *McCarl*, 79 F. 2d 144 (D.C. Cir. 1935); *Heidt* v. *United States* 56 F. 2d 559 (5th Cir. 1932).

> within the exclusive control of Congress, it was free to limit the benefits of the 1958 active duty pay increase to members on the active duty list.

We hold that this same general rule is applicable to the present case.

As a further ground for challenge of the constitutionality of the Act, plaintiffs urge that the Act is unconstitutional because no standards were therein provided for exercise of the legislative discretion delegated by Congress to the Secretary of the Air Force to retire the lieutenant colonels and colonels here involved before completion of their statutory terms of 28 and 30 years respectively.

The trial commissioner in his findings, which we adopt, has set forth in detail the full and extensive information and explanation of the background and purpose of this legislation presented to the Congress by the Cordiner Committee and the Department of Defense. Extensive hearings were conducted by the appropriate committees of the Congress, and it is clear that Congress fully understood the action that it was taking and the consequences thereof to the officers who could be retired under this legislation. Whatever the "White Charger" catch name may imply, it is a misnomer if it implies hasty or ill-considered action by Congress.

The objective of Bill S. 1795 as finally enacted was made abundantly clear to the Congress through the reports of hearings and the Committee reports. The Senate Committee on Armed Services in its Report No. 571, 86th Cong., 1st Sess., stated:

> The basic purpose of this bill is to provide certain "quality control" authority for the management of regular officer personnel in the military departments. [p. 2]
>
> * * * *
>
> * * * The Bill in effect provides discretionary authority whereby officers in these two grades who failed at least twice for promotion to permanent rank could be selectively retired prior to completing the full 28 or 30 years respectively. [p. 2]
>
> * * * *

BACKGROUND

The proposed legislation stems from the studies and recommendations of the Cordiner Committee. That Committee stressed the need for additional authority for involuntary retirement of officers in the permanent grades of lieutenant colonel, colonel, and equivalent ranks, whose performance of duty did not measure up to the high quality standards required. Further, the Committee has urged that in light of the substantial increases in pay for the higher grades there should be a corresponding emphasis on measures to insure that only *officers of the highest quality and potential were promoted to and retained in these higher grades.* [p. 3] [Emphasis supplied]

* * * *

It is the view of the Department of Defense that this legislation does not constitute a breach of faith with respect to officers who might consider themselves adversely affected by its provisions. The military services over many years have sought and obtained changes in the laws regarding their personnel policies with a view toward improving the forces and of meeting changing times and conditions. Changes have been made over a number of years in both the retirement systems and the promotion systems in order to meet the needs of the services. * * * [p. 9]

The House Committee's Report No. 1406, 86th Congress, 2d Sess., concludes:

Within the framework of existing law, the military services have been and are now vigorously carrying out sound, progressive, personnel programs and administrative measures designed to make career service more attractive and to improve further the quality of the career officer structure. Measurable progress has resulted from these programs and every effort will be continued to consolidate and improve the gains already made.

The [sic] remains, however, a need for added flexibility in some of the statutory provisions presently controlling the promotion, retention, and involuntary retirement of Regular officers. [p. 16]

With these considerations clearly before the Congress, it specifically gave the Secretary authority to convene boards to review the records of and recommend for continuation

on the active list in numbers specified by the Secretary, colonels or lieutenant colonels who have at least 20 years of service, and who have been considered more than twice, but not recommended for promotion to the next higher grade. However, with respect to the first board, the number specified by the Secretary for continuation in active service must be at least 80 percent of the officers in the category being considered. Such officers could be considered only once under this section of the Act.

The two leading cases advanced in support of plaintiffs' contention are *Panama Refining Co., et al.* v. *Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp., et al.* v. *United States*, 295 U.S. 495 (1935). The rule in these cases as to unconstitutional delegation of legislative standards was not applied in *Fahey, Federal Home Loan Bank Commissioner, et al.* v. *Mallonee, et al.*, 332 U.S. 245 (1947), since the Supreme Court found that both cases were distinguishable on their facts. This case involved a provision of the Home Owners' Loan Act of 1953 that authorized a delegation of legislative discretion to the Federal Home Loan Bank Board to prescribe by regulation the terms and conditions under which a conservator may be appointed for a Federal savings and loan association.

The Supreme Court said in *Fahey* v. *Mallonee, supra*, at p. 249:

> * * * This, the District Court held, was unconstitutional delegation of the congressional function. It relied on *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, and *Schechter Corp.* v. *United States*, 295 U.S. 495.
>
> Both cited cases dealt with delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. * * *

And at p. 250:

> The savings and loan associations with which § 5(d) deals, on the other hand, are created, insured and aided by the Federal Government. It may be that explicit standards in the Home Owners' Loan Act would have been a desirable assurance of responsible

administration. But the provisions of the statute under attack are not penal provisions as in the case of *Lanzetta* v. *New Jersey*, 306 U.S. 451, or *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. The provisions are regulatory. They do not deal with unprecedented economic problems of varied industries. They deal with a single type of enterprise and with the problems of insecurity and mismanagement which are as old as banking enterprise. The remedies which are authorized are not new ones unknown to existing law to be invented by the Board in exercise of a lawless range of power. Banking is one of the longest regulated and most closely supervised of public callings. It is one in which accumulated experience of supervisors, acting for many states under various statutes, has established well-defined practices for the appointment of conservators, receivers and liquidators. Corporate management is a field, too, in which courts have experience and many precedents have crystallized into well-known and generally acceptable standards. *A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might not be allowable to authorize creation of new crimes in uncharted fields.* [Emphasis supplied]

In the recent case of *United States* v. *Robel*, 389 U.S. 258 (1967), the Supreme Court found that a section of the Subversive Activities Control Act of 1950, which provided that when a communist action organization is under a final order to register, it is unlawful for any member of the organization "to engage in any employment in any defense facility," was unconstitutional.

Justice Brennan, concurring in the result, pointed out that the area of permissible indefiniteness in Congressional delegation of authority narrows when criminal sanctions are invoked and fundamental rights are potentially affected. However, by way of contrast, he added [*Id.* at 274-75]:

> Congress ordinarily may delegate power under broad standards. *E.g.*, *Dakota Central Tel. Co.* v. *South Dakota*, 250 U.S. 163, 183; *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591; *NBC* v. *United States*, 319 U.S. 190. No other general rule would be feasible or desirable. Delegation of power under general directives is an inevitable consequence of our complex society, with its myriad, ever changing, highly technical problems. "The Constitution has never been regarded as denying to the Congress the necessary re-

> sources of flexibility and practicality * * * to perform its function * * *." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421; *Currin* v. *Wallace*, 306 U.S. 1, 15. It is generally enough that, in conferring power upon an appropriate authority, Congress indicate its general policy, and act in terms or within a context which limits the power conferred. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 584-585; *FCC* v. *RCA Communications, Inc.* 346 U.S. 86; *Lichter* v. *United States*, 334 U.S. 742; *Yakus* v. *United States*, *supra*, 321 U.S. at 424; *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8; *FTC* v. *Gratz*, 253 U.S. 421; *Buttfield* v. *Stranahan*, 192 U.S. 470. * * *

We conclude that Congress gave sufficiently specific directives "within a context which limits the power conferred." Certainly, the Congressional Committee reports on the bill set out the basic guidelines and purposes for administrative action as to deferred officers who came within the quality control concept.

As a corollary to the assertion of unconstitutionality of the Act, plaintiffs further assert that the Secretary had no authority to delegate his own exercise of discretion to convene selection boards and specify the number of officers to be continued on the active list,[4] whereas the Deputy Chief of Staff Personnel allegedly performed these functions under delegation and orders from the Secretary. In this respect, the Act permits [74 Stat. 395]:

> "(a) Not more than once in each fiscal year, the * * * *Secretary of the Air Force* may convene one or more boards * * * to review the records of, and recommend for continuation on the active list, officers of that component * * *.
>
> "(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by *the Secretary.* * * *" [Emphasis supplied]

We conclude that the delegation of authority to the Deputy Chief of Staff, Personnel, to convene the board and to specify the number of officers to be retained on active duty was a permissible and valid delegation.

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[4] This is the only challenge to the Secretary's power to subdelegate his authority raised by plaintiffs in their brief. See, Plaintiffs' Brief, pp. 38-40.

The reason for this conclusion is obvious. Congress could not possibly have intended that every single power vested in the Secretary of the Air Force be *actually* executed by him. The multitudinous duties of that office would necessarily receive scant and superficial attention if the Secretary were to perform each function of his office personally. The fact that Congress also authorized an Air Staff (which includes the Deputy Chief of Staff of Personnel) to "furnish professional assistance to the Secretary" [5] supports this conclusion. This proposition is applicable where, as here, the decision to be made, *viz.*, how many officers are to be continued on the active duty list, is in the nature of an expert opinion based on the accumulation and interpretation of many disparate facts peculiarly within the knowledge of the Deputy Chief of Staff in charge of Personnel. It is this expertise and knowledge upon which the Secretary relied when he authorized the Deputy Chief of Staff to make this decision. The "law does not preclude practicable administrative procedure in obtaining the aid of assistants in the department." *NLRB* v. *Duval Jewelry Co.*, 357 U.S. 1, 7 (1958). In addition, it should be noted that the decision was not made by the Deputy in his own name, but rather in the name of the Secretary. The Secretary, in effect, "ratified" the Deputy's decision and issued the decision by his own authority. *Cf. Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442, 446 (5th Cir. 1966). We conclude that the sub-delegation of authority from the Secretary to the Deputy Chief of Staff, Personnel, was a valid delegation of power.

In further support of its assertion that the Act is unconstitutional because it fails to prescribe adequate standards for selecting officers retained or retired, plaintiffs assert:

> * * * Under the statute, the Secretary, in carrying out its provisions, could retire mandatorily the youngest, the oldest, the tallest, the thinnest, or the heaviest officers, or all graduates of a particular educational institution, or those with blue eyes, who had at least twenty years of service and had been passed over more than twice for promotion to the next higher grade. This, we contend, clearly renders the statute

[5] Act of Aug. 10, 1956, c. 1041, 70A Stat. 490; Aug. 6, 1958, Pub. L. 85-599, § 4(h), 72 Stat. 517, 10 U.S.C. § 8032.

unconstitutional and void. [Plaintiffs' Exceptions and Objections to the Commissioner's Report, p. 31]

The purpose of this Act, as clearly stated by the Cordiner Committee, the Senate Committee on Armed Services, and the House Committee was to emphasize measures to insure that *only officers of the highest quality and potential* were to be promoted or retained in these higher grades. To attain these objectives the Congress clearly envisioned the need for added flexibility in some of the statutory provisions controlling the promotion, retention and involuntary retirement of Regular officers, as shown by the legislative history of the Act.

As a further ground for assertion that the Act is unconstitutional, plaintiffs assert that they were not afforded the usual constitutional rights of a hearing confrontation and cross-examination.

The Act provides for alternative types of elimination or release from duty:

1. The show-cause action; and
2. Project 20-3 proceedings.

The first type of proceeding is used for elimination on the grounds of misconduct or gross inefficiency, while the second provides for retirement of officers as a personnel control measure. It is apparent, in reading the record of the Congressional hearings, that *two* types of proceedings were contemplated by Congress, and there is no question in reading the provisions of PL 86-616 that two separate and independent procedures and actions are provided for in the legislation. The statute contemplates that show-cause proceedings would involve hearings, counsel, confrontation and cross-examination—a full-fledged formal proceeding. On the other hand, Section 10 of the Act provides for a summary proceeding. Congress was fully aware of the distinction between the two procedures, as the legislative hearings and particularly the Committee reports demonstrate. In the case of Section 10 eliminations, Congress advisedly made provision for summary proceedings.

The stigma that could have resulted from specific charges of inefficiency or undesirability was one of the principal consequences of mandatory retirement by show-cause procedure which Congress intended to avoid by authorizing the alternative type of proceeding utilized in this

case. Indeed, as the Deputy Chief of Personnel of the Air Force said, in reviewing this problem (*supra*):

> Since the great majority of the eligible officers are all well qualified for promotion, the board soon realizes that in reality, *they are selecting the best of the best qualified.* [Emphasis supplied]

In this connection, the recent case of *Norbert Chwat* v. *United States*, 175 Ct. Cl. 392 (1966) is noteworthy. While this case involved the separation of a Foreign Service Officer, it would appear to have equal application to the instant case. The court stated, at p. 397:

> When the plaintiff was "retired" or selected-out "because he did not measure up to the standards of his class" and also because the action was being taken under sections 633 and 634 of the Foreign Service Act, he was not entitled to a hearing, since none is provided under sections 633 and 634. * * *
>
> * * * *
>
> [Citing report of the Committee on Foreign Affairs, Report No. 229, at page 12]:
>
> > * * * *It should be observed that this section is not a substitute for the provisions governing separations for cause.* * * * [Emphasis in original.]
>
> It follows then, that the *two methods* for separating officers of the Foreign Service, by selection-out without a hearing under section 633, and by discharge after a hearing under section 637, stand on an equal footing and both methods have the approval of the Congress * * *. [Emphasis added]

In anticipation of the adoption of the Act, the Secretary, in April, 1960, convened a Screening Board of general officers of the Air Force to recommend a minimum-maximum quota of officers for continuation on the active list. After the Act became law, and pursuant to the recommendations of this preliminary Screening Board, the Chief of Staff, by order of the Secretary, on July 25, 1960, established by order a program for controlled retirement of the officers affected by the Act, known as Project 20-3. This order contained specific instructions to the first selection board therein appointed. The instructions provided, in part:

> * * * Using the "Best Qualified" method of selection, the board shall select and recommend officers for con-

tinuation on the active list within the percentages prescribed below:

a. Permanent Colonel: Not less than 55% nor more than 75% of those considered.

b. Permanent Lieutenant Colonel: Not less than 45% nor more than 65% of those considered.

* * * Within the percentages specified above, the Deputy Chief of Staff, Personnel, shall establish for the Secretary of the Air Force during the course of the board, the exact number of officers in each grade to be selected for continuation * * *.

The Letter of Instructions further stated that "in making its selections, the board will be guided by the following pertinent considerations":

a. As a result of the rapid expansion of the Regular Air Force after World War II, officers were promoted to the permanent grade of Colonel with as little as 14 years of service, to permanent Lieutenant Colonel with as little as 8 years of service.

b. Until the exactment [sic] of the Public Law 86-616, these officers could serve in the grade of Colonel for 16 years and in the grade of Lieutenant Colonel for 20 years prior to mandatory retirement for service.

c. Some of these officers have lost their initiative and drive; others have been unable to keep pace with technical and operational advances occurring subsequent to World War II.

d. Limitations placed upon the number of officers who may serve on active duty in the grades of Colonel and Lieutenant Colonel make it essential that only highly qualified officers continue to occupy these grades if the Air Force is to maintain a quality officer corps.

e. An officer once considered for continuation or involuntary retirement under Public Law 86-616 may not again be considered in that same grade.

These instructions were clearly in careful compliance with the purposes and directives of the Congress in enacting the statute.

Thereafter, the Selection (Continuation) Board reported that, upon careful consideration of all the records, it recommended 310 of 430 Colonels, and 589 of 964 Lieutenant Colonels for continuation, and that those not selected for continuation should be retired. Plaintiffs were listed

among this latter category. The Board certified that it carefully reviewed the case of every officer submitted to it for consideration, and that a majority of the total board members concurred in the recommendations.

The trial commissioner has summarized the actions and conduct of the Board as follows:

> (a) The Selection (Continuation) Boards of 1961 (Colonels Norman, Crowley, Buckland, Fitzgerald, and Buckey) and of 1963 (Colonel Martin) were composed of mature senior general officers of varying and extensive experience in many fields. They contributed judgment to the task of evaluation.
>
> (b) In addition to the OER's (officers' effectiveness reports), they gave consideration in their evaluations to commendations, historical records of service, age, educational background, scope and level of responsibility of assigned position, and demonstrated qualities of leadership.
>
> (c) * * * these boards did not rely upon IBM card selections of numerical equivalents of OER's. While they did devise and apply a numerical rating system of their own, they sometimes disregarded the results shown by it in that some officers were selected for continuation whose numerical values were less than those of some officers who were not selected for continuation.
>
> (d) The significance of the concentration upon OER's in findings 14 through 26, relating to individual plaintiffs in this litigation, stems from the results of the statistical analysis of the White Charger Program to which reference was made in finding 13(a). In that study, the OER's of the officers, as individuals and as groups, were reduced to numerical equivalents from which averages were derived. In each of the individual cases herein considered, the affected officer fell into a position below the mean or average into a relative position vis-a-vis his fellow officers who were also under consideration to such as extent as to absolve the decision of the continuation board of serious question.
>
> * * * *
>
> (b) The Secretary of the Air Force has administered Project 20-3 in conformity with the authority granted to him by the Congress. There is no evidence of arbitrary, capricious, or illegal action by the Secretary in such administration; nor is any action by the

> Secretary or of the screening and selection boards convened by him lacking in support by substantial evidence.
>
> [Commissioner's Report, pp. 29 and 30]

We concur in these findings as amply supported by the record. The Board's failure to select plaintiffs for continuation was not arbitrary, or unsupported by substantial evidence.

In *Goldstein* v. *United States*, 131 Ct. Cl. 228, 130 F. Supp. 330, *cert. denied* 350 U.S. 888 (1955), this court stated, at p. 232:

> * * * Nor can this court undertake to grant plaintiff promotions or assignments which the Army having jurisdiction over him decided not to make. * * *

In *Donnelly* v. *United States*, 133 Ct. Cl. 120, 134 F. Supp. 635 (1955), this court stated, at p. 122:

> * * * Perhaps it was wrong for the Navy not to have promoted plaintiff; * * *. Appointment is an executive function, involving the exercise of executive discretion. * * * This court cannot exercise this function and in the absence of actual appointment, or facts equivalent thereto, we cannot award Plaintiff Donnelly compensation as commissaryman, chief. * * *

See, *Chase* v. *United States*, 159 Ct. Cl. 610 (1962).

In the case of *Garrard Johnson* v. *United States*, 150 Ct. Cl. 747, 280 F. 2d 856 (1960), *cert. denied*, 365 U.S. 882 (1961), this court stated, at p. 751:

> We think that the proper exercise of judicial restraint requires this court to decline to intervene in this matter. Certainly it was no part of the original act by which Congress created the jurisdiction of this court to make us the overseer of the military. * * *

We conclude that Section 10 of the Act of 1960, *supra*, is a constitutional delegation of discretionary power to the Secretary of the Air Force within the limitations and purposes of the Act; that his delegation of review to the Selection or Continuation Board was within constitutional limitations, and that the recommendations of the Board and the action of the Secretary thereupon were not arbitrary, capricious, or contrary to law, and are supported by substantial evidence.

For the above reasons, plaintiffs are not entitled to recover, and their petitions are dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner W. Ney Evans, and the briefs and argument of counsel, makes findings of fact as follows:

1. (a) The 6 cases in caption are part of a series of cases, now numbering 15 altogether, wherein former officers (lieutenant colonels and colonels) of the Air Force challenge the validity of their retirement under the so-called White Charger Act [1] in a program designated by the Air Force as Project 20-3.[2]

(b) At the time of the trial of "Norman and Related Cases," there were 10 cases in the series. Evidence has been completed as to the six cases in caption, and the parties have filed their requested findings and briefs. Four of the 10 cases were deferred because of the pendency in each of a motion by defendant for summary judgment. Five cases in the series have been filed since the trial.[3]

(c) Findings 2-13 and 27-30, below, are relevant to each of the six cases now reported.

2. (a) The term "White Charger Act" is a popular reference to section 10 of Public Law 86-616, approved July 12, 1960 (74 Stat. 386, 395). Public Law 86-616 reflected the enactment of S. 1795, 86th Cong., 1st Sess., introduced in the Senate on April 25, 1959, as permanent legislation to permit early retirement of not to exceed 20 percent of officers in the military service in the grade of permanent colonel and an unlimited number of permanent lieutenant colonels with 20 years or more of service who had been considered at least twice but not recommended for promotion.

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[1] The name was derived from an anonymous observation to the effect that the legislation went through Congress like a White Charger.

[2] The "20" refers to years of service; the "3" to "pass-overs"; all as hereinafter more fully explained.

[3] The four cases deferred are: Charles W. Bicking, No. 306-62; Clifford A. Dougherty, No. 311-62; Lamont Saxton, No. 314-62; and Owen F. Clarke, No. 178-64. Defendant's motions for summary judgment were subsequently denied and amended pleadings (petitions and answers) have been filed.

In the five additional cases, answers to the petitions have been filed in Walter Eckman, No. 445-65; George B. Marvel, Jr., No. 79-66; Harold W. Scruggs, No. 93-66; and Phil B. Cage, No. 379-66. Answer had not (at the time of this writing) been filed in the case of Samuel H. McKinnon, No. 399-66.

(b) A hearing was held before a subcommittee of the Committee on Armed Services of the Senate on June 17, 1959; the bill was reported to the Senate (S. Rep. No. 571) on July 23, 1959, and passed by the Senate on July 27, 1959. Reference to the Committee on Armed Services of the House of Representatives followed on July 28, 1959.

(c) Hearings before the House committee were held on February 1-4 and March 14-15, 1960. The bill was reported to the House of Representatives (H.R. Rep. No. 1406) on March 17, 1960. The House report presented an amendment consisting of striking all after the enacting clause and inserting a new text. As amended, the bill was considered and passed by the House on March 30, 1960. The House amendment was accepted by the Senate on June 27, 1960. Approval by the President followed on July 12, 1960.

3. (a) S. 1795, as initially introduced and as ultimately passed, was the outgrowth of a draft of proposed legislation submitted to the Congress by the Secretary of Defense, as "* * * part of the Department of Defense legislative program for 1959 * * *."

(b) Following are excerpts from identical covering letters addressed to the President of the Senate and the Speaker of the House of Representatives by the Deputy Secretary of Defense on April 20, 1959:

> The purpose of the proposed legislation is to enable the Armed Forces to meet more effectively the objective of a Regular officer corps of the highest quality in all ranks by (1) more closely relating the retention of officers after 20 years of service who are serving in the permanent grades of lieutenant colonel and colonel, commander and captain to the requirements of the services, including the degree of contribution or productivity of the officer and the needs of the services rather than solely to a "guaranteed" number of years of service; (2) according increased recognition and incentive for outstanding ability and competence; * * * and (4) *expediting the separation from the service of officers who have been twice deferred from permanent promotion.* [Emphasis supplied.]
>
> * * * *
>
> It is emphasized that the proposed legislation is not intended to cause, and will not be used for, the involuntary removal of Regular officers from the active list

solely because of a reduction in the actual or authorized personnel strength of the service concerned. Rather it is intended that the removal of Regular officers from the active list will continue to be authorized only for the reasons and under the procedures and limitations now provided by law for such removal *and as further provided by the proposed legislation.* (Emphasis supplied.)

4. (a) S. 1795, as initially introduced in the Senate, was "A Bill To amend title 10, United States Code, to revise certain provisions relating to the promotion and involuntary retirement of officers of the regular components of the armed forces." The opening section contained the counterpart of what became section 10 of Public Law 86-616.

(b) Following is a condensation of pertinent portions of section 1 of original S. 1795:

(a) Not more than once in each fiscal year, the Secretary of a military department may convene one or more boards * * * to review the records of, and recommend for continuation on the active list, officers * * * in the * * * permanent grades who have at least 20 years of service * * * and who, in the case of officers of the Army or the Air Force * * * have been considered at least twice but not recommended for promotion * * *:

(1) Colonel * * *.

(2) Lieutenant colonel * * *.

* * * *

(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for their particular categories of officers. However, the number specified by him for officers in any category in the grade of colonel * * * must be at least 80 percent of the officers in that category being considered.

(c) * * * if the Secretary approves the report of a board, he shall * * * retire each officer who is considered but not recommended for continuation.

* * * *

(c) At the hearing before the subcommittee of the Senate Committee on Armed Services, the chairman (Senator Stennis) observed:

* * * the provisions of * * * two pending items * * * are similar in that a board procedure is estab-

lished whereby regular lieutenant colonels * * * and colonels * * * who have twice failed of selection to the next higher grade may be involuntarily retired prior to completing the normal years of service for officers in those twice-failed categories. In the Army and Air Force a twice-failed lieutenant colonel remains on active duty until he has completed 28 years. * * * For colonels * * * it is 30 years * * *. All officers affected under both bills would have completed 20 years of service for retirement purposes.

* * * *

It should also be pointed out that the authority in S. 1795 would be used only to retire involuntarily those officers whose standard of performance would not justify their continuance on active duty. * * *

(d) The Assistant Secretary of Defense (Mr. Finucane), in his testimony before the subcommittee, said:

S. 1795 is essentially an officer personnel quality control measure which when compared to existing law will:

1. Provide for the Army and Air Force a more flexible, less restrictive procedure for involuntary retirement of the least effective officers in the permanent grades of colonel and lieutenant colonel * * *.

2. Accord increased recognition and incentive for officers of outstanding ability.

* * * *

The most important provisions of S. 1795 are those dealing with the selective, involuntary retirement of certain officers with more than 20 years' service, who are in the permanent grades of colonel * * * [and] lieutenant colonel * * *.

These provisions are limited in application to officers in the grades I have mentioned because in the lower grades in all services the elimination or retirement of an officer from the active list is already required by law if the officer is twice "passed over" for permanent promotion * * *. In effect S. 1795 extends that system on a discretionary basis to the higher grades.

Existing law permits officers in the permanent grade of colonel * * * to be retained until they have completed 30 years of service regardless of the number of times they have been considered but not selected for the next higher grade. Similarly, officers in the permanent grade of lieutenant colonel * * * are retained until they have completed 28 years * * * of service * * *; * * *.

The intent behind these provisions was to protect and retain competent officers in those grades who could not be promoted to the next higher grade because of lack of vacancies for promotion. The Department of Defense believes, however, that these provisions for retention also operate in some cases to keep on the active list some officers whose performance in the grades concerned does not equal the potential expected of them when they were promoted.

* * * *

(e) The Assistant Secretary described the procedure under S. 1795 as follows:

S. 1795 would augment existing law pertaining to involuntary retirement of officers with more than 20 years' service by authorizing the service Secretaries to convene not more than one each fiscal year, a board of five general * * * officers, to consider for continuation on the active list, officers in the permanent grade of colonel or * * * lieutenant colonel * * * who have failed twice of selection for permanent promotion to the next higher grade. From among the colonels * * * considered, the board must select for continuation at least 80 percent. No limitation would be imposed on the number of officers in the lower grades who could be involuntarily retired. *Any officer not selected for continuation on active duty would be retired.* (Emphasis supplied.)

* * * *

(f) The Assistant Secretary also commented on "other considerations" which are pertinent to these cases:

* * * *

Two other important considerations arise in connection with S. 1795 which I believe require expression of the view of the Department * * *. These are:

1. Whether its enactment could reasonably be regarded as a "breach of faith" to the detriment of officers now in service, particularly those with more than 20 years' service; and

(2) Whether it would materially lessen the security incentive aspect of military service so as to discourage young persons of the desired quality and potential from undertaking a military career.

We have earnestly considered both these aspects. It has been concluded that neither of these considerations is sufficient to override the more important issue at stake; that is, the public interest in an officer

corps composed throughout of persons whose professional ability and contribution fully meet the high standards which must apply to the career officer, and who would make a constant try toward bettering their professional capabilities and thus further the working efficiency of the Armed Forces.

Standards can and must be high without being extreme. It is recognized that abilities vary from man to man and are partly what heredity and environment have made them. If nature had not imposed a ceiling, mere striving would make every man a genius. In battle or comparable emergency, however, mediocrity in any form cannot be tolerated. It follows that, if we are to achieve and maintain maximum defense preparedness in this age of world tensions, we cannot afford or tolerate any lower standards of competence than must prevail in war.

* * * *

(g) The Assistant Secretary concluded:

* * * S. 1795 is a long-range, permanent measure to provide more flexibility in the career management of Regular officers. We believe the changing times and needs of the military services make this legislation essential.

At the same time, however, the Department of Defense is deeply aware of the need for administering this bill, if it is enacted into law, in such a way as to insure continued fair and equitable treatment of any officer who might be affected by its provisions.

* * * *

(h) Among the questions put to the Assistant Secretary and the answers given by him after the completion of his formal statement before the Senate subcommittee, the following are pertinent:

(1) *Senator Stennis.* * * * [T]he authority of this legislation would, of course, permit the involuntary retirement of officers prior to the completion of the normal periods of service. Would you mind confirming for the record the fact that this authority is not meant to alter the pattern for a normal 30-year career but is aimed solely at retiring those officers whose performance does not justify their continuation on the active list.

I suppose your answer to that is an emphatic "Yes."

Mr. Finucane. Yes, sir.

Senator Stennis. Now, the charge may also be made that this legislation constitutes a breach of

faith for officers who would be adversely affected and could normally be expected to serve on active duty for a longer period. Since this bill only supplements existing authority, would this charge in any way be true?

Mr. Finucane. No, sir.

(2) *Senator Stennis.* The involuntary retirement authority is permissive, and it is my understanding that only the Air Force intends to make immediate use of this bill if enacted. * * *

Mr. Finucane. * * * [T]he Air Force has a requirement for this at the moment. * * *

(3) *Senator Thurmond.* If a Reserve officer fails of promotion twice when he comes before a board, then he goes out of the Reserves. There is no such provision for the Regular services, is there?

Mr. Finucane. Yes, sir. When an officer fails twice of promotion, up to the grade of lieutenant colonel, he is eliminated. Under this provision, lieutenant colonels and up to 20 percent of the colonels * * * or whatever percentage the Secretary agreed below that could be involuntarily retired * * *.

Senator Thurmond. In other words, under the present law he is eliminated up to the grade of lieutenant colonel and under the proposed law he would be eliminated up to the grade * * * of * * * colonel.

Mr. Finucane. Yes, sir; he would not be given this * * * 28- and 30-year guarantee tour. Colonels up to 20 percent * * * could be retired before those ultimate requirements of years of service, but they would have all had over 20 years of service, so they would get their pensions and they would have been passed over twice. * * *

(4) *Senator Cannon.* * * * [I]f this bill has as its purpose the elimination of substandard officers, why can't they be eliminated under the present law under show-cause procedure?

Mr. Finucane. This is not * * * necessarily an elimination of officers that would be subject to a show-cause procedure. This is a carrying on of a program of last year's pay increase that we were going to have an officer proficiency arrangement where you could, if you wanted to, eliminate some of your weak officers without "showing cause."

In other words, between all humans there is a degree of effectiveness and when you get into a show-cause, you are inferring, at least, that the man has done something wrong. This is not aimed at that at all. The mere fact that he has been passed over twice

indicates that he probably is not quite as good as somebody else who was not passed over.

(5) *Senator Thurmond.* * * * [I]s the main purpose of this bill to eliminate officers of the grade now of lieutenant colonel and colonel * * * in order to make way for other officers to give an incentive because you have a larger proportion within those grades than any others and it is stymieing promotions?

Mr. Finucane. No. * * * The essential reason for this bill is to give the services a vehicle to remove the officer who has slowed up because he knows he cannot be touched until he completes 30 years.

In other words, this gives a quality control of the people that are now in what is known in the services as the "sanctuary."

5. (a) The Committee on Armed Services of the Senate reported S. 1795 favorably, with minor amendments, one of which required that at least 80 percent of the twice-failed lieutenant colonels (as well as colonels) considered by a particular board should be continued on the active list. The Senate passed the bill as reported.

(b) Subcommittee No. 1 of the Committee on Armed Services of the House of Representatives began hearings on S. 1795 on February 1, 1960. Following are excerpts from the opening statement of the chairman of the subcommittee:

The purpose of S. 1795, as amended by the Senate, is to establish an additional method by which regular officers in the armed services in the grade of colonel and lieutenant colonel * * * may be involuntarily retired.

* * * [W]hile this bill applies to all four services, it is realy an Air Force measure since none of the other three services intend to use the authority contained in the proposal for the present.

* * * *

At present, permanent lieutenant colonels in the Air Force are being twice failed to the next higher permanent grade of colonel at an average of 20 years of service. The second failure for permanent promotion to brigadier general by colonels in the Air Force occurs in about the 25th year of service.

Under the proposed legislation, as amended, the Secretary of each service would be given the authority to convene boards to involuntarily retire twice failed lieutenant colonels and colonels * * *. However, the board may only select for involuntary re-

tirement a maximum of 20 percent of the twice failed officers in each grade.

* * * *

* * * [T]he basic purpose of the legislation is to eliminate, through a board selection process, certain Regular officers in the grade of colonel and lieutenant colonel who cannot perform their duties in a manner commensurate with the responsibilities of the grades in which they are now serving, under today's standards.

* * * *

* * * [T]here is a present method by which officers can be involuntarily retired under a "show cause" procedure.

* * * *

This "show cause" procedure will not be eliminated by this proposal.

* * * *

The Department of Defense, however, takes the position that the show cause procedure is not effective in reaching the marginal officer that this bill is intended to reach.

No officer will be retired under this bill who is not qualified for retirement pay.

* * * *

(c) The Assistant Secretary of Defense (Mr. Finucane) appeared before the House subcommittee and presented a prepared statement quite similar to his statement before the Senate subcommittee. Following are excerpts from the questioning of the Assistant Secretary by members of the subcommittee:

(1) *Mr. Kilday.* * * * [Y]ou call this a continuation board. You select the board to determine those lieutenant colonels and colonels who shall be continued in the service. Of course, that results in the selection of those who are to be eliminated.

Secretary Finucane. That is correct.

(2) *Mr. Hardy.* * * * [T]he officers currently on duty who would be affected by this wouldn't be so happy about it; is that right?

Secretary Finucane. * * * [T]he person who is going to be involuntarily eliminated through this process is going to be disappointed to a certain degree.

* * * *

Mr. Hardy. * * * [I]f you impose this, aren't you taking away something that he already has?

Secretary Finucane. * * * [W]e are taking away something that he has if he feels that he was going to just hang on until the bitter end. * * *

Mr. Hardy. You are taking away a period of active service to any of those who are plucked out.

Secretary Finucane. That is right, and the ones that are plucked out are the least desirable officers and we think in the interest of the service that we should do that.

Mr. Hardy. So aren't you in effect stigmatizing them? * * *

Secretary Finucane. * * * [T]he word "stigmatizing" desires some analysis.

Anybody that gets to be a colonel or a captain has performed a very significant career pattern. He has been through some very, very difficult and strict selection boards up to that time, and, indeed, he has equipped and qualified himself very well. I personally have always felt and feel that any man who makes that grade and retires has very honorably discharged his duties, unless he is relieved for cause.

And this is the very heart of this bill. There is nobody here relieved—nobody is accused of anything.

Now, in the present system of eliminating lesser officers by board action, they are in fact removed for cause. So we think that this is an excellent quality control, something that is going to do the services a great deal of good, without the radical removal of officers that we were forced to take in the Navy hump bill. There are fairly few officers involved here, Mr. Hardy.

(3) *Mr. Osmers.* * * * [W]ould you say that the main purpose of this legislation was to create spaces for younger officers or to improve the quality of this top group?

Secretary Finucane. It is our hope to use this permissive legislation, if passed, very sparingly to eliminate only the very bottom in these grades. It is a positive action. It is not done to make vacancies. It is not done to reduce the size of the services. It is not done even to have fewer officers. It is done to help us, to give us a vehicle for eliminating some of our weakest officers in these grades, where they are now protected against competition by the so-called sanctuary.

(d) Upon the completion of the testimony of the Assistant Secretary of Defense, civilian officials and ranking officers of the Air Force testified at length before the

House subcommittee, explaining in detail the situation of the Air Force and justifying the need for the proposed legislation.

(e) Similarly, civilian officials and ranking officers of the Army and the Navy appeared before the subcommittee to explain facets of S. 1795 other than the mandatory retirement provisions.

(f) As a consequence of the extensive testimony presented to the House subcommittee, the bill was rewritten and regrouped, resulting in the mandatory retirement provisions here pertinent being placed in section 10 instead of section 1 as originally drafted.

6. (a) The Committee on Armed Services of the House of Representatives reported favorably the amended bill which, as heretofore noted, was passed by the House on March 30, 1960, accepted by the Senate on June 27, 1960, and approved by the President on July 12, 1960.

(b) Following is an abstract of section 10 of Public Law 86-616 (74 Stat. 395):

> * * * (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers * * * in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers * * * in the regular grade of colonel or lieutenant colonel who have at least 20 years of service * * * and who have been considered more than twice but not recommended for promotion to the next higher regular grade.
>
> (b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board * * *, the number specified by him for officers in any category must be at least 80 percent of the officers in that category being considered. An officer may be considered for continuation on the active list * * * only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.
>
> (c) * * * [I]f the Secretary approves the report of a board, he shall, not later than the first day of the seventh * * * month * * * retire each officer who is considered but not recommended for continuation.
>
> (d) A member * * * retired under this section is entitled to retired pay * * *.

(e) * * *.

(f) This section is not effective after June 30, 1965.

(c) By comparison of the foregoing text with the text of section 1 of the original bill as summarized in finding 4(b), the following changes are noteworthy:

(1) The law as enacted was limited to the Army and the Air Force, whereas the original bill gave similar authority to the Secretary of a military department.

(2) The law as enacted authorized the retirement of officers "who have been considered more than twice but not recommended," whereas the original bill applied to officers "who have been considered at least twice but not recommended."

(3) The law as enacted required that "except with respect to the first board, * * * the number specified * * * [for continuation] must be at least 80 percent * * *" whereas the original bill required continuation of 80 percent of the colonels but placed no limitation on the number of lieutenant colonels.

(4) The law as enacted was limited to June 30, 1965, whereas the original bill was proposed as permanent legislation.

7. (a) During World War II, the number of officers on active duty with the Army Air Corps (predecessor of the Air Force) was expanded some 125 times, from a nucleus of 3,000 (1,400 Regular; 1,600 Reserve) to 375,000. Of course, the great majority of these were Reserve officers. After the war, the Regular officer strength was fixed at 23,000; and shortly after the creation of the Air Force in 1947,[4] the officer strength was raised (in 1948) to 48,000.

(b) The expansion of the Regular officer corps from 1,400 officers (upon United States entry into the war) to some 23,000 Regular officers (after the war) was accomplished by means of selections[5] from officers who had served in the war. The officers so selected were promoted quite rapidly from the lower grades to the higher grades for the purpose of staffing the higher grades. This process was repeated in 1948, by what has been described as

[4] By the National Security Act of 1947, approved July 26, 1947, 61 Stat. 495, 502-03.

[5] The selections were made by selection boards from applicants for Regular commissions.

a "one-shot adjustment" of the officers then in the Regular force to higher permanent grades, in order to align and distribute the officers in the higher grades.

(c) Following the outbreak of hostilities in Korea, in 1950, the overall officer strength of the Air Force was again increased to 130,000, the approximate level at which it has since remained. The Regular officer authorized strength was fixed in 1956 at approximately 69,000.

(d) As a result of these programs, officers were promoted to the grade of colonel with 12 or 13 years of service, 10 years before they would have reached that grade in the Army or Navy. The Air Force thus made senior officers of men who were junior in age to the senior officers of the other services. With promotions thereafter limited, these Air Force senior officers were in line for many years of service in their attained rank with limited prospects of promotion to the next higher permanent grade.

(e) In April 1956, the Deputy Chief of Staff of Personnel of the Air Force, commented on this situation in a statement published in the Air Force Personnel News Letter.

> The 1946 and 1947 integration program increased the Regular Officer corps to 17,500. * * *
>
> As a result, the age and experience of 12,000 of our Regular officers is concentrated in the five year bracket of officers commissioned from 1941 through 1945.
>
> * * * *
>
> With as many of our regular officers concentrated in this five year group, and with only a limited number of spaces available for promotion to permanent colonel, junior officers of this group would be mandatorily retired as lieutenant colonel without ever competing for promotion to permanent colonel.
>
> In light of this, a plan was developed in 1953 and has been in use since 1955 which will assure every Regular Air Force Officer at least two opportunities for permanent promotion to colonel before he is mandatorily retired.
>
> * * * *
>
> Since the great majority of the eligible officers are all well qualified for promotion, the board soon realizes that in reality, they are selecting the best of the best qualified.
>
> * * * *

In this situation non-selection reflects in no way upon the individual qualifications of the officers concerned or the Air Force's continued reliance on and the need for their services.

(f) At about this same time (during the middle 1950's), there were expressions of concern by responsible officials of the Air Force, relative to the quality of some of the officers then serving in the Regular Air Force in the grades of lieutenant colonel and colonel. These expressions were founded on the impression that some such officers, having been integrated into the Regular Air Force, were not performing in the manner desired and expected of senior officers.

(g) Under the Officer Personnel Act of 1947,[6] lieutenant colonels could expect to continue to serve until they had completed 28 years of service; and colonels could expect to continue to serve until they had completed 30 years of service. Critics of the situation considered existing law to provide a sanctuary for officers whose performance was not what the critics thought it should be.

(h) The Officer Personnel Act of 1947 provided[7] mandatory elimination (by separation or retirement) of "deferred officers" of the Army of the grade of first lieutenant, captain, or major who failed of selection for promotion under stated standards.

(i) The only method then available for the elimination of officers of the grades of lieutenant colonel and colonel was by means of a demonstrated deficiency in performance of such degree as to warrant elimination through show cause procedures. Critics of the Air Force situation in the middle and late 1950's believed that the show cause procedures had not been effective in eliminating officers solely upon the basis of inadequate performance; that the show cause procedures were being utilized only in gross cases of very serious inefficiency, or in cases involving misconduct which, while unrelated to charges of inefficiency, had the colorable effect of stigmatizing any officer subjected to the show cause procedure.

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[6] Approved August 7, 1947, 61 Stat. 795.

[7] In section 509, 61 Stat. 894, 896.

(j) In May 1957, the Cordiner Committee, in its Report for the Secretary on Professional and Technical Compensation, noted the "Military Manpower Problem":

> The modern military manpower problem, reduced to its simplest terms, is one of quality rather than quantity. It is not merely a matter of the total number of people on hand, but is much more a matter of the level of competence, skill and experience of those people.
>
> * * * *
>
> (8) As retention of quality military personnel improves, revitalize existing personnel controls and institute new controls to accomplish the following:
>
> * * * *
>
> A stiffening of the criteria of selection for promotion and retention to insure the retention and advancement in all grades of only the highly qualified.
>
> * * * *
>
> As an example of the type of problem facing the Services in this area, there exists within each of the Services a small group of officers in grades 0-5 and 0-6 for whom this safeguard has served a purpose for which it was not intended. Having failed of selection for promotion and being in the sanctuary of this provision, these officers have not continued to produce with customary effectiveness. * * *
>
> The Committee, however, is convinced that "quality attracts quality." Therefore, a positive requirement exists for each Service to employ all administrative and legislative measures now available to them to separate from active duty the less productive officers within its officer corps. The Committee recommends that additional remedial Service legislation should be sought if found necessary in the establishment of effective personnel quality controls.

(k) The legislative proposal which culminated in section 10 of Public Law 86-616 was founded on the foregoing considerations.

8. (a) On April 19, 1960, in anticipation of the enactment of the White Charger legislation, a Screening Board of six general officers of the Air Force was convened to recommend a minimum-maximum quota of officers for continuation on the active list. The board was given and duly reviewed a sample set of records, selected at random,

representing approximately one-third (71) of some 215 permanent colonels and one-third (173) of 552 permanent lieutenant colonels who would become eligible for consideration under the legislation.

(b) The Screening Board was informed that:

> The law, if enacted in its present form, will allow 100% of the officers considered by the first [Central or Selection] board to be retired involuntarily. For subsequent boards the law specifies that at least 80% of those considered must be continued on active duty. In each case, however, the law requires that the Secretary of the Air Force specify the exact number to be continued on active duty.

The purpose for which the initial Screening Board was convened was to recommend quotas for the first selection board.

(c) The Screening Board recommended that "the Air Force should establish the following selection quotas * * *:"

> a. Permanent colonels—select for continuation on active duty not more than 75%, but at least 55% of those considered.
>
> b. Permanent lieutenant colonels—select for continuation on active duty not more than 65%, but at least 45% of those considered.

(d) The Screening Board reported that "in making the foregoing recommendations the board was guided by the following pertinent considerations:"

> a. Although 100% of the eligibles may be selected for involuntary retirement by the first board convened under this Law, the Secretary of the Air Force must specify the *exact* number to be retained by the board.
>
> b. The Letter of Instructions to the Central Board will, within any minimum-maximum limits established, delegate to the Deputy Chief of Staff, Personnel, authority to specify for the Secretary of the Air Force the *exact* number in each group to be continued on active duty, based upon the findings and recommendations of the Central Board.
>
> c. * * *
>
> d. The "Best Qualified" method of selection will be used by the Central Selection Board. * * *

9. On July 25, 1960 (13 days after the approval of Public Law 86-616), the Department of the Air Force in

a letter to all commands advised that the program for the controlled retirement of officers affected by the legislation would be known as Project 20-3; that the initial Project 20-3 board would be convened in headquarters on or about November 14, 1960; that officers to be considered by the board would include permanent colonels with permanent date of rank of 1953 or earlier, and permanent lieutenant colonels with permanent date of rank of 1950 or earlier; and that the letter should be disseminated to all subordinate commands and brought immediately to the attention of all interested officers.

10. (a) On November 8, 1960, the Letter of Instructions was issued by the Office of the Chief of Staff "by order of the Secretary of the Air Force" appointing "a selection board designated Regular Colonel and Lieutenant Colonel Continuation Board FY-1961" consisting of 10 general officers, to convene at headquarters on or about November 14, 1960.

(b) Following are pertinent excerpts from the Letter of Instructions:

> * * * The purpose of the board is to select Regular Colonels and Lieutenant Colonels of the Line for continuation on active duty from among those officers who have failed of selection for promotion to the next higher permanent grade five or more times and three or more times, respectively.
>
> * * * The Deputy Chief of Staff, Personnel, shall furnish the board with the names and records of the * * * officers for consideration [giving specific limits on the promotion lists].
>
> * * * Using the "Best Qualified" method of selection, the board shall select and recommend officers for continuation on the active list within the percentages prescribed below:
>
> a. Permanent Colonel: Not less than 55% nor more than 75% of those considered.
>
> b. Permanent Lieutenant Colonel: Not less than 45% nor more than 65% of those considered.
>
> * * * Within the percentages specified above, the Deputy Chief of Staff, Personnel, shall establish for the Secretary of the Air Force during the course of the board, the exact number of officers in each grade to be selected for continuation * * *.

(c) The Letter of Instructions further stated that "in making its selections, the board will be guided by the following pertinent considerations:"

a. As a result of the rapid expansion of the Regular Air Force after World War II, officers were promoted to the permanent grade of Colonel with as little as 14 years of service, to permanent Lieutenant Colonel with as little as 8 years of service.

b. Until the exactment [sic] of Public Law 86-616, these officers could serve in the grade of Colonel for 16 years and in the grade of Lieutenant Colonel for 20 years prior to mandatory retirement for service.

c. Some of these officers have lost their initiative and drive; others have been unable to keep pace with technical and operational advances occurring subsequent to World War II.

d. Limitations placed upon the number of officers who may serve on active duty in the grades of Colonel and Lieutenant Colonel make it essential that only highly qualified officers continue to occupy these grades if the Air Force is to maintain a quality officer corps.

e. An officer once considered for continuation or involuntary retirement under Public Law 86-616 may not again be considered in that same grade.

(d) With respect to the report to be made by the selection board, the Letter of Instructions specified:

* * * The Report of the Board shall be addressed to the Secretary of the Air Force. It shall contain the names of the officers selected and recommended for continuation on active duty by the board, listed in order of permanent grade seniority separately for Colonels and Lieutenant Colonels, and those selected for involuntary retirement listed in a similar manner.

* * * The Report of the Board shall be signed by all members and shall certify that:

a. The board has carefully reviewed the record of every officer submitted to it for consideration.

b. Voting was conducted by secret ballot.

c. A majority of the total voting membership of the board concurs in the recommendations thereof.

11. (a) The Selection (Continuation) Board reported to the Secretary of the Air Force on December 14, 1960 (1) that it had convened on November 14, 1960, and was in session during November 14-18 and on December 14, 1960; (2) that the Deputy Chief of Staff, Personnel, had

furnished the board with the names and records of eligible officers to be considered for continuation, being 430 permanent colonels and 964 permanent lieutenant colonels; (3) that the Deputy Chief of Staff, Personnel, had instructed the board, "in accordance with paragraph 6 of the Letter Order, to select for continuation not less than the number of officers specified in Exhibit 'B'" (wherein the board was advised that it might select for continuation 310 colonels and 589 lieutenant colonels); (4) that the board had "carefully considered all records made available to it * * *"; and (5) that of the 430 permanent colonels, the board selected 310 for continuation; and that of the 964 permanent lieutenant colonels, the board selected 589 for continuation.

(b) The board recommended that:

a. The 310 permanent Colonels selected for continuation * * * be continued on the active list * * *.

b. The 589 permanent Lieutenant Colonels selected for continuation * * * be continued on the active list * * *.

c. The 120 permanent Colonels, not selected for continuation * * * be retired.

d. The 375 permanent Lieutenant Colonels, not selected for continuation * * * be retired.

In each instance, the officers were listed by name in separate attachments which are not in evidence.

(c) The board further certified that:

a. It has carefully reviewed the case of every officer submitted to it for consideration.

b. Voting was conducted by secret ballot.

c. A majority of the total board membership concurs in the recommendations.

12. (a) The identity of the members of the Selection (Continuation) Board was not made known to the officers who were considered by it.

(b) Such officers were not given opportunity (1) to challenge the membership of the board, (2) to appear personally before the board, or (3) to present evidence in their own behalf.

13. (a) While no member of the Selection (Continuation) Board testified at the trial as to the board's deliberations, the Chief of the Personnel Branch of the Direc-

torate of (Air Force) Personnel Planning made a statistical study of the White Charger Program for Fiscal Years 1961 and 1963 (covering the period here pertinent) and testified concerning it.

(b) This witness explained the use of Officer Effectiveness Reports (hereinafter OER's) and the use of Overall Numerical Equivalents assigned thereto. Three separate OER forms were cited: one in use from November 1953 through May 1958; one in use from June 1958 through September 1960; and one adopted in October 1960. Each form had designations of five or more categories with numerical equivalents from 0 through 9 assigned to the various categories.

(c) Following is a breakdown of AF Form 77, of November 1953:

Category	*Numerical Equivalents*
Unsatisfactory	0
An acceptable officer	2
A dependable and typically effective officer	3-4-5
A very fine officer of great value to the service	6-7-8
One of the very few outstanding officers I know	9

(d) Following is a breakdown of AF Form 77, of June 1958:

Category	*Numerical Equivalents*
Unsatisfactory	0
Marginal	1
An acceptable officer	2
A dependable and typically effective officer	3-4-5
A very fine officer of great value to the service	6-7-8
One of the very few outstanding officers I know	9

(e) Following is a breakdown of AF Form 707, of October 1960:

Category	*Numerical Equivalents*
Unsatisfactory	0
Marginal	1
Below average	2
Slightly below average	3
Effective and competent	4-5
Effectiveness well above most	6
Excellent, seldom equaled	7
Outstanding, almost never equaled	8
Absolutely superior	9

(f) Comparison of the foregoing breakdowns reveals that an officer rated in 1953 as dependable and typically effective might have been rated in 1960 as either slightly

below average or as effective and competent, while a very fine officer of great value to the service in 1953 might have emerged in 1960 with either effectiveness well above most or as outstanding, almost never equaled, depending in each instance upon the numerical equivalent.

(g) The evidence is unclear as to the extent (if any) to which numerical equivalents, as above cited, were before the selection board. The testimony is emphatic that the selection board did not content itself with IBM card selections of numerical equivalents of OER's. The significance of the items and figures recited in this finding is therefore limited to a single fact: viz, that during the period 1954 to 1960 there was a continuing rise in OER averages "which [rise] amounted during that period to approximately one full block in the overall rating scale." [8]

(h) This inflation of the rating average lies at the heart of the complaint of every officer involved in this litigation.

ROSCOE L. NORMAN

14. Roscoe L. Norman, plaintiff in Case No. 295-62, seeks by his action to recover the difference between the active duty pay he would have received if he had not been retired under the White Charger Act and the retired pay he has received since July 31, 1961, the date of his retirement under that Act. As to him the parties have stipulated the facts set forth below in findings 15 and 16.

15. (a) Colonel Norman enlisted in the Enlisted Reserve Corps of the United States on 16 July 1937,[9] and was honorably discharged 31 August 1937, to accept a commission as second lieutenant. He accepted an appointment as second lieutenant, Infantry Reserve, on 1 September 1937, and served on active duty for the periods 1 June 1938, to 30 November 1939, and from 16 June 1940, to 29 June 1940.

(b) He was ordered to extended active duty on 28

[8] For example, the average OER rating of all lieutenant colonels in 1954 was a fraction below 7; in 1960 that average was 8. The average OER rating for colonels in 1954 was approximately 7.25; by 1960 it was better than 8.25. Numerical ratings of 8 or better signified very high quality overall, and few officers could have fallen far below since there was only one more block (or portion thereof—from 8 to 9) to pull up the overall average.

[9] He was then 21 years of age. He was born 1 October 1915, at Rochester, Indiana. He is a citizen of the United States, a resident of Indiana, residing temporarily in Puerto Rico.

August 1940, and continued on active duty in the Armed Forces until 31 July 1961, when he was retired in the grade of lieutenant colonel under the provisions of section 10, Public Law 86-616, and advanced to the grade of colonel pursuant to section 8963, title 10, United States Code.

(c) Because of satisfactory service, he was promoted from time to time until he reached the rank of permanent lieutenant colonel in the United States Air Force on 21 April 1951, and temporary colonel on 1 January 1953, in which grade he was serving when retired. His total promotion list service at retirement was 24 years and 17 days.

(d) During his service as an Air Force officer, Colonel Norman was described in the efficiency and effectiveness reports submitted by the officers under whom he served as a "Very Fine Officer of Great Value to the Service." Some of such reports contained commendatory remarks describing him as a highly qualified officer technically, whose duty was performed with a high degree of effectiveness, one of the better and more effective comptrollers in the Air Force, an officer capable of handling positions of greater responsibility, a "top-notch" officer, and one who should be promoted in advance of his contemporaries. He received an Air Force Commendation Medal and a citation for meritorious service for the period 1 April 1956, to 23 January 1960. Fifteen letters of appreciation and commendation are or should be [sic] in his 201 file.

16. (a) Prior to and through the year 1958 and thereafter the Department of the Air Force sought authority from the Congress for the elimination by mandatory retirement or discharge of deficient, unsatisfactory, marginally effective, and substandard Air Force officers. By representations and statements to the Congress that the purpose of such proposed legislation was not the creation of vacancies for the promotion of junior officers, but the elimination of ineffective, inefficient, unsatisfactory, and substandard officers for the betterment and improvement of the service, the Air Force procured enactment of the Act of 12 July 1960.

(b) The names and grades of the members of the board of officers convened by Air Force letter dated 8 November 1960, under section 10 of said Act were with-

held from Colonel Norman, although demand for that information was duly made. He also made a due and timely application in writing on 14 February 1961, to the Secretary of the Air Force for a statement of the reasons for identifying him as an officer to be retired, but that information was not furnished, for the stated reason that such cause for not selecting him for retention on active duty is "known only to the composite membership" of the selection board.

(c) When the Act of 12 July 1960, was enacted there were about 1,000 Regular Air Force lieutenant colonels who had been passed over for promotion more than twice without being promoted and who had 20 or more years of promotion list service to their credit.

(d) Colonel Norman was not permitted to challenge or cross-examine members of the boards convened pursuant to the Act of 12 July 1960, and was not granted any hearing or opportunity to show cause for retention on the active list of the Air Force.

(e) Colonel Norman was first considered for promotion to the grade of colonel Regular Air Force by the selection board in 1956 and was not so selected. He was again so considered by each succeeding annual selection board, including the board of June 12, 1961, and was not selected for promotion to the grade of permanent colonel.

(f) On 30 January 1961, the Director of Military Personnel, Headquarters, Air Defense Command, United States Air Force, Ent Air Force Base, Colorado Springs, Colorado, notified Colonel Norman in writing that he had been considered but not recommended for continuation on the active list and that he would be retired not later than 31 July 1961.

(g) Similar letters were written by the respective Major Command headquarters to each officer who had been considered but not recommended for continuation on the active list, notifying him of this fact and that he would be retired not later than 31 July 1961.

JOHN E. CROWLEY

17. John E. Crowley, plaintiff in Case No. 321-62, seeks by his action to recover the difference between the active duty pay he would have received if he had not been

retired under the White Charger Act and the retired pay he has received since July 31, 1961, the date of his retirement under that Act.

18. (a) Colonel Crowley was appointed a second lieutenant in the Quartermaster Reserve Corps, United States Army, on December 27, 1939,[10] accepted the appointment on January 13, 1940, was ordered to extended active duty on March 27, 1941, and served continuously on active duty until July 31, 1961. He was promoted from time to time until he reached the rank of permanent lieutenant colonel in the Regular Air Force on October 20, 1950, and temporary colonel on August 16, 1951, in which grade he was serving when he was retired.

(b) For the period of service from December 27, 1951, to July 31, 1960, 10 effectiveness reports, all on Air Force Form 77, were made by officers under whom he served. In nine of such reports his overall rating was "A Very Fine Officer of Great Value to the Service," and the remaining report, March 1 to July 30, 1960, gave him the highest rating, viz, "One of the Very Few Outstanding Officers I Know." He was granted the following awards: Pre-Pearl Harbor Medal; two Commendation Medals; World War II Victory Medal.

(c) Colonel Crowley was first considered for promotion to the grade of colonel in the Regular Air Force in 1955 and was not selected. He was again so considered by each succeeding annual promotion board, including the board of June 12, 1961, and was not selected for promotion to the grade of permanent colonel.

(d) By stipulation of the parties, the facts recited in findings 16(a), 16(c), and 16(d), above, in relation to Colonel Norman, have been adopted and made applicable to the case of Colonel Crowley.

SHERWOOD E. BUCKLAND

19. Sherwood E. Buckland, plaintiff in Case No. 336-62, seeks by his action to recover the difference between the active duty pay he would have received if he had not

[10] A native of Massachusetts, born in Boston on June 1, 1911, he was then 28 years old.

been retired under the White Charger Act and the retired pay he has received since July 31, 1961, the date of his retirement under that Act.

20. (a) Colonel Buckland received bachelor of science degrees from New York University in 1934 and from the United States Military Academy in 1938.[11] He was appointed second lieutenant in the Coast Artillery Corps of the Army on 14 June 1938, and first lieutenant on 14 June 1941. He continued on active duty from 14 June 1938, until 31 July 1961, when he was retired under the White Charger Act.

(b) He reached the rank of temporary colonel in the Air Force on 18 June 1945, and permanent colonel on 23 June 1952, the grade in which he was serving when he was retired.

(c) Since his promotion to colonel, his effectiveness reports characterized him most often as "A Very Fine Officer of Great Value to the Service," once as "One of the Very Few Outstanding Officers I Know," and once as "A Dependable and Typically Effective Officer." He was awarded the National Defense Service Medal and the Air Force Longevity Award with 4 bronze leaf oak clusters.

(d) Colonel Buckland was first considered for promotion to the grade of brigadier general in 1955 and was again considered by each annual board, but was never selected for promotion.

(e) By stipulation of the parties, the facts recited in findings 16(a), 16(c), and 16(d), above, in relation to Colonel Norman, have been adopted and made applicable to the case of Colonel Buckland.

MAURICE J. FITZGERALD

21. Maurice J. Fitzgerald, plaintiff in Case No. 256-64, seeks by his action to recover the difference between the active duty pay he would have received if he had not been retired under the White Charger Act and the retired pay he has received since July 31, 1961, the date of his retirement under that Act.

22. (a) Colonel Fitzgerald enlisted in the Regular Army on October 13, 1937, and was commissioned a second lieutenant in the Air Reserve in 1938. He reached

[11] A native of New York, he was then 25 years of age.

the grade of permanent lieutenant colonel in the Regular Air Force on April 12, 1951, and was serving in that grade at the time of his retirement.

(b) Fifteen effectiveness reports made during the period from January 1, 1952, to July 31, 1961, gave him 12 overall evaluations as "A Very Fine Officer of Great Value to the Service," 2 evaluations of "Effectiveness Well Above Most Officers," and 1 rating as "A Dependable and Typically Effective Officer." He was awarded citations and decorations as follows: American Defense Service Medal; American Campaign Medal; European-African-Middle Eastern Campaign Medal; World War II Victory Medal; National Defense Service Medal; Air Medal with 1 Oak Leaf Cluster; and a letter of commendation.

(c) Colonel Fitzgerald was first considered for promotion to the grade of permanent colonel in 1956 and was not so selected. He was again so considered by each succeeding annual selection board, including the board of June 12, 1961, and was not selected.

(d) The facts recited in findings 16(a), 16(c), and 16(d), above, in relation to Colonel Norman, have been adopted by stipulation of the parties and made applicable to the case of Colonel Fitzgerald.

JOHN B. MARTIN

23. John B. Martin, plaintiff in Case No. 313-64, seeks by his action to recover the difference between the active duty pay he would have received if he had not been retired under the White Charger Act and the retired pay he has received since June 30, 1963, the date of his retirement under that Act.

24. (a) Colonel Martin was appointed second lieutenant, United States Army Reserve, on November 29, 1939, and served on active duty continuously thereafter until his mandatory retirement on June 30, 1963. He reached the grade of temporary colonel in the Air Force on April 15, 1943, and permanent colonel on April 11, 1957.

(b) Fifteen effectiveness reports made from 1952 through 1963 rated him as "One of the Very Few Outstanding Officers I Know" (in 1952 and 1953); "A Very Fine Officer of Great Value to the Service" (in 1954, 1955, 1956, 1957, 1958, and 1960); "A Dependable and Typically Effective Officer" (in 1954 and 1959); and

"Effective and Competent" (in 1963). For the period of service from February 7, 1962, to April 8, 1963, he received the Air Force Commendation Ribbon.

(c) Colonel Martin was first considered for promotion to the grade of brigadier general in 1959, and was again considered by each annual board thereafter and was not selected.

(d) The Selection (Continuation) Board under Project 20-3, as a result of whose deliberations Colonel Martin failed of selection for continuation, convened on October 22, 1962, under instructions to apply the "Best Qualified" method in selecting for retention not less than 80 percent of the officers to be considered and to be guided by the following considerations:

> * * * Some of these officers have lost their initiative and drive. Others have been unable to keep pace with technical and operational advances.
>
> * * * Limitations placed on the number of officers who may serve on active duty * * * make it essential that only highly qualified officers continue to occupy these grades.

(e) The board recommended 385 colonels for continuation and 60 for retirement.

LOREN E. BUCKEY

25. Loren E. Buckey, plaintiff in Case No. 351-64, seeks by his action to recover the difference between the active duty pay he would have received if he had not been retired under the White Charger Act and the retired pay he has received since July 31, 1961, the date of his retirement under that Act.

26. (a) Colonel Buckey entered the armed services as an aviation cadet on April 28, 1941, and was commissioned second lieutenant, Air Reserve, on December 12, 1941. He continued on active duty until his retirement in 1961, reaching the grade of lieutenant colonel, temporary, on February 5, 1951, and permanent on April 12, 1951, the grade in which he was serving at the time of his retirement.

(b) Fourteen effectiveness reports, covering the period from November 3, 1951, to March 5, 1960, characterized Colonel Buckey as "A Very Fine Officer of Great Value to

the Service" or as "A Dependable and Typically Effective Officer." During the same period he received the following awards: B-29 Combat Crew Training School; Medium Bombardment—Jet B-47 Transition School: Atomic Biological and Chemical Warfare School (Nuclear Weapons).

(c) Colonel Buckey was first considered for promotion to the grade of colonel in 1956, and was again considered by each succeeding annual selection board, including the board of June 12, 1961, but was not selected for promotion.

(d) The facts recited in findings 16(a), 16(c), and 16(d), above, pertaining to Colonel Norman, have been adopted by stipulation of the parties and made applicable to the case of Colonel Buckey.

SUMMARY

27. (a) The Selection (Continuation) Boards of 1961 (Colonels Norman, Crowley, Buckland, Fitzgerald, and Buckey) and of 1963 (Colonel Martin) were composed of mature senior general officers of varying and extensive experience in many fields. They contributed judgment to the task of evaluation.

(b) In addition to the OER's (officers' effectiveness reports), they gave consideration in their evaluations to commendations, historical records of service, age, educational background, scope and level of responsibility of assigned position, and demonstrated qualities of leadership.

(c) As indicated in finding 13(g), these boards did not rely upon IBM card selections of numerical equivalents of OER's. While they did devise and apply a numerical rating system of their own, they sometimes disregarded the results shown by it in that some officers were selected for continuation whose numerical values were less than those of some officers who were not selected for continuation.

(d) The significance of the concentration upon OER's in findings 14 through 26, relating to individual plaintiffs in this litigation, stems from the results of the statistical analysis of the White Charger Program to which reference was made in finding 13(a). In that study, the OER's of the officers, as individuals and as groups, were reduced to numerical equivalents from which averages were derived. In each of the individual cases herein considered, the affected officer fell into a position below the

mean or average into a relative position vis-à-vis his fellow officers who were also under consideration to such an extent as to absolve the decision of the continuation board of serious question.

28. (a) In the presentation and development of S. 1795 into enactment as Public Law 86-616, the Department of Defense (and the Air Force in particular) fully informed the responsible committees of Congress of the problems involved and the solutions proposed. The Congress was fully aware of the action it was taking in enacting S. 1795 into law.

(b) The Secretary of the Air Force has administered Project 20-3 in conformity with the authority granted to him by the Congress. There is no evidence of arbitrary, capricious, or illegal action by the Secretary in such administration; nor is any action by the Secretary or of the screening and selection boards convened by him lacking in support by substantial evidence.

29. (a) The governing law of the cases is deeply embedded in the power and the duty of the legislative and executive branches of the Government to regulate the Armed Forces.

(b) No valid warrant has been cited for challenging (1) the authority of the Congress to provide for mandatory retirement of officers of the Armed Forces (i) at an earlier date than prescribed by previous authority [12] or (ii) without the panoply of show cause proceedings; [13] (2) the constitutionality of the statute for lack of standards governing administrative discretion; or (3) the authority of the Secretary of the Air Force to delegate the powers conferred upon him by the statute.

30. (a) The alleged stigmatism of officers mandatorily retired under the White Charger Act is colorable only. It stems from the juxtaposition of such words as "deficient," "unsatisfactory," "marginally effective," "ineffective," "inefficient," and "substandard" as used in finding 16(a) with the categories of the OER's (delineated in finding 13) classifying officers as "acceptable," "dependable and

[12] The principle is well established that there is no vested right to Federal employment or to the privileges of retirement from time to time thereunto appertaining.

[13] The elimination of hearings (with concomitant challenges, appearances, and presentations) was specifically requested by the Air Force and expressly granted by the Congress.

typically effective," "very fine officer of great value to the service." Neither set of words can be properly understood unless read in context.

(b) The context in which the Air Force used such seemingly derogatory terms as "deficient," "ineffective," "marginal," and "substandard" was related to its problem with the show cause procedure for the removal of officers for "failure to achieve the standards of performance * * * prescribed by the Secretary * * *,"[14] which the Air Force had found ineffectual except for "cause," and "cause" in such cases was related to gross inattention to duty. An officer could be considered marginally effective without being charged with gross inattention to duty.

(c) The context in which the Air Force grouped officers in its OER's, as "acceptable," "dependable," "typically effective," and even "very fine officer of great value to the service" was related to the very human necessity for a rating officer to work with his subordinate in amity.

(d) Aside from semantics, the net effect of the White Charger legislation was to place officers of the rank of colonel and lieutenant colonel in competition with others of equal rank for continuation. Failure of selection for continuation placed no greater stigma on officers of these ranks than had been applied for years past to officers of lower rank (major, captain, and lieutenant) who found themselves in the category of "deferred" officers subject to automatic separation.

(e) In any event, if failure of selection for continuation be deemed to carry with it the stigma of being less than the best of the better, in relation to the whole competitive group, no legal significance flows therefrom.

CONCLUSION OF LAW

On the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover. Therefore, their petitions are dismissed.

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[14] 10 U.S.C. § 3781 (1958 ed.).

Public Law 86-616, 86th Congress, S 1795, 74 Stat. 395

Approved July 12, 1960

* * * *

Sec. 10. (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers of the Regular Army or the Regular Air Force, as the case may be, in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers of that component on the active list in the regular grade of colonel or lieutenant colonel who have at least 20 years of service computed under section 3927(a) or 8927(a) of title 10, United States Code, whichever applies, and who have been considered more than twice but not recommended for promotion to the next higher regular grade.

(b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers. However, except with respect to the first board convened under his section in the Army and in the Air Force, the number specified by him for officers in any category must be at least 80 percent of the officers in that category being considered. An officer may be considered for continuation on the active list under this section only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.

(c) Except as provided by section 1 of the Act of April 23, 1930, ch. 200, as amended (5 U.S.C. 47a), if the Secretary approves the report of a board, he shall, not later than the first day of the seventh calendar month beginning after he approves that report, retire each officer who is considered but not recommended for continuation.

(d) A member of the Army or the Air Force who is retired under this section is entitled to retired pay com-

puted under formula A of section 3991 or 8991, respectively, of title 10.

(e) This section does not apply to—

(1) members of the Army Nurse Corps, Army Medical Specialist Corps, or Women's Army Corps;
(2) Air Force nurses or medical specialists; or
(3) female members of the Air Force who are not designated under section 8067(a)-(d) or (g)-(i) of title 10.

(f) This section is not effective after June 30, 1965.

Title 10, United States Code

Sec. 8916. Twenty-eight years; promotion-list lieutenant colonels.

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of lieutenant colonel shall be retired, except as provided by section 47a of title 5, on the thirtieth day after he completes 28 years of service computed under section 8927(a) of this title. However, if his name is carried on the list of officers recommended for appointment to the regular grade of colonel, he shall be retained on the active list while his name is so carried.

"* * * *"

Sec. 8921. Thirty years or five years in grade; promotion-list colonels.

(a) Unless retired or separated at an earlier date, each promotion-list officer in the regular grade of colonel shall be retired, except as provided by section 47a of title 5, on the fifth anniversary of the date of his appointment in that regular grade or on the thirtieth day after he completes 30 years of service computed under section 8927 (a) of this tile, whichever is later. However, if his name is carried on the list of officers recommended for appointment to the regular grade of brigadier general, he shall be retained on the active list while his name is so carried.

"* * * *"

Sec. 8963. Higher grade or service during certain periods: regular and reserve commissioned officers.

(a) A regular commissioned officer who is retired, or a reserve commissioned officer who is retired or to whom retired pay is granted, is entitled to a retired grade equal to the highest temporary grade in which he served on active duty satisfactorily, as determined by the Secretary of the Air Force, for not less than six months.

"* * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 656

ROSCOE L. NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–48a) is reported at 392 F. 2d 255.

JURISDICTION

The decision of the Court of Claims was rendered on March 15, 1968. A timely motion for a new trial was denied on July 17, 1968. The petition for a writ of certiorari was filed on October 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether Section 10 of P.L. 86–616 violates the due process clause of the Fifth Amendment by permitting the Secretary of the Air Force to retire offi-

cers under a personnel reduction program without affording them a trial-type hearing.

2. Whether the Court of Claims correctly held that the merits of petitioners' discharge were not subject to judicial review.

3. Whether Section 10 of P.L. 86–616 constitutes an unconstitutional delegation of power and whether the Secretary's redelegation of power is lawful.

STATUTE INVOLVED

P.L. 86–616, 74 Stat. 386, 395, July 12, 1960, provides in pertinent part:

* * * * *

> Sec. 10. (a) Not more than once in each fiscal year, the Secretary of the Army and the Secretary of the Air Force may convene one or more boards, each consisting of at least five officers of the Regular Army or the Regular Air Force, as the case may be, in a grade above colonel, to review the records of, and recommend for continuation on the active list, officers of that component on the active list in the regular grade of colonel or lieutenant colonel who have at least 20 years of service computed under section 3927(a) or 8927(a) of title 10, United States Code, whichever applies, and who have been considered more than twice but not recommended for promotion to the next higher regular grade.
>
> (b) A board convened under this section shall recommend officers for continuation on the active list in the number specified by the Secretary. The Secretary may specify separate numbers for particular categories of officers.

However, except with respect to the first board convened under this section in the Army and in the Air Force, the number specified by him for officers in any category must be at least 80 percent of the officers in that category being considered. An officer may be considered for continuation on the active list under this section only once while serving in the regular grade of colonel and only once while serving in the regular grade of lieutenant colonel.

(c) Except as provided by section 1 of the Act of April 23, 1930, ch. 209, as amended (5 U.S.C. 47a), if the Secretary approves the report of a board, he shall, not later than the first day of the seventh calendar month beginning after he approves that report, retire each officer who is considered but not recommended for continuation.

(d) A member of the Army or the Air Force who is retired under this section is entitled to retired pay computed under formula A of section 3991 or 8991, respectively, of title 10.

(e) This section does not apply to—

(1) members of the Army Nurse Corps, Army Medical Specialist Corps, or Women's Army Corps;

(2) Air Force nurses or medical specialists; or

(3) female members of the Air Force who are not designated under section 8067 (a)–(d) or (g)–(i) of title 10.

(f) This section is not effective after June 30, 1965.

STATEMENT

As a result of the expansion of the military forces subsequent to World War II, a number of officers, particularly in the Air Force, were promoted rapidly to the grades of Colonel and Lieutenant Colonel. Many of those officers had limited prospects for further promotion. Hearings, Subcommittee of the Senate Armed Services Committee on S. 1795, 86th Cong., 1st Sess., pp. 38–39. Officials in the Defense Department became concerned about the relative ability of such officers who could expect to continue on active duty without further promotion until the completion of from 28 to 30 years of service.[1] S. Rep. No. 571, 86th Cong., 1st Sess., p. 3.

In 1960 Congress, at the request of the Secretary of Defense and after hearings before Committees of both houses, enacted Section 10 of P.L. 86–616, 74 Stat. at 395. Under that section, the Secretaries of the Army and the Air Force were authorized to convene Boards "[n]ot more than once each fiscal year" for the purpose of recommending "for continuation on the active list" of officers of the rank of colonel and lieutenant colonel those who had served at least 20 years and who "[had] been considered more than twice but not recommended for promotion." The Act further provides that if the Secretary approves the report of the Board, he "shall retire each officer who is considered but not recommended for continuation." By its own terms, the statute "is not effective after June 30, 1965" (Section 10f), 74 Stat. 395.

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[1] 10 U.S.C. 8916 and 8921.

Petitioners are former Air Force officers who were retired under P.L. 86–616 on the recommendations of Selection Boards convened in 1961 and 1963 (Pet. App. 39a–48a). In each case, the officer was found by the Board to have a rating below the average officer under consideration (Pet. App. 17a, 46a–47a). Petitioners instituted this suit in the Court of Claims, asserting that their separation from the Air Force was improper. They sought to recover the difference between their retirement pay and the pay they would have received had they served until the completion of the maximum terms permitted under law (Pet. App. 2a).

The Court of Claims dismissed their petitions (Pet. App. 1a–48a; 392 F. 2d 255). The court found that the Secretary of the Air Force had fully complied with the requirements of the statute in effecting petitioners' removal. The court held that in view of the nature of the removal program and petitioners' status as servicemen, the statute did not unconstitutionally impair any "vested" rights, nor did it unlawfully delegate legislative authority to the Secretary.

ARGUMENT

1. Petitioners' primary attack on the statute is that Congress cannot constitutionally provide for the removal of military personnel under a provision such as Section 10, P.L. 86–616, without affording the persons affected a trial-type hearing (Pet. 6–8). In *Reaves* v. *Ainsworth,* 219 U.S. 296, 304, this Court rejected the contention that the absence of full trial-

type proceedings in a military discharge case violated due process, and stated (*ibid.*):

> What is due process of law must be determined by circumstances. To those in the military or naval services of the United States, the military law is due process. The decision, therefore, of a military tribunal acting within the scope of its lawful powers cannot be reviewed or set aside by the courts.

Accord, *Creary* v. *Weeks,* 259 U.S. 336, 343.

Surely, in the context of the personnel requirements of the armed services, Congress can provide for a summary method of reducing forces where such action is found to be in the national interest. *Creary* v. *Weeks, supra,* 259 U.S. at 343.[2] Indeed, this Court has recognized that, even with respect to civilians, "government employment, in the absence of legislation, can be revoked at the will of the appointing officers." *Cafeteria Workers* v. *McElroy,* 367 U.S. 886, 896.

Petitioners had no "vested" right to remain on duty 28 to 30 years. Under 10 U.S.C. 8916 and 8921 (upon which they rely), the statutory terms of service apply "Unless [an officer is] retired or separated at an earlier date * * *." Since both provisions on their

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[2] It should be noted that here the separation does not carry with it the stigma of a finding that the officer has not performed his duties satisfactorily. By contrast, under Section 7(a) of P.L. 86-616 (now 10 U.S.C. 8781-8787), which was *not* utilized in this case, provision is made for removal of an officer whose "performance of duty has fallen below standards prescribed by the Secretary", and the officer is afforded a show-cause hearing under that provision, with formal charges and trial-type proceedings.

face specify the maximum service permitted before retirement is mandatory, these provisions do not purport to confer vested rights upon officers to remain on duty for the extended periods. But even assuming that petitioners' rights had to some degree become vested, the sovereign has the power to modify such rights in cases involving the manpower needs of the armed forces. Compare *Norman* v. *B. & O. R. Co.*, 294 U.S. 240; *Louisville and Nashville R.R. Co.* v. *Mottley*, 219 U.S. 467; *El Paso* v. *Simmons*, 379 U.S. 497, 508; *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91. See also *Lynch* v. *United States*, 292 U.S. 571, 579.

2. It is also clear that the merits of the military decision to reduce the number of officers is beyond the province of the courts. *Reaves* v. *Ainsworth*, *supra*, 219 U.S. at 304; *Creary* v. *Weeks*, *supra*, 259 U.S. at 344; *French* v. *Weeks*, 259 U.S. 326, 335; *Payson* v. *Franke*, 282 F. 2d 851 (C.A.D.C.), certiorari denied, 365 U.S. 815. See also *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94. The Court of Claims, therefore, correctly declined to substitute its judgment for that of the Secretary of the Air Force with regard to the wisdom of retiring the petitioners under the Act.

3. There is no merit to petitioners' contention that the statute is unconstitutional because it fails to prescribe adequate standards for the Secretary in implementing its mandate. The statute on its face outlines clear guidelines for selection of officers for retirement: (1) they must have served at least 20 years and (2) have failed of promotion after being con-

sidered at least three times. Moreover, with the exception of the first Board of Selection, the Boards were required to recommend for continuation at least 80 per cent of the officers considered, thus permitting removal of a maximum of only 20 per cent considered. In light of the legislative history of the Act, these standards give an entirely reasonable basis for administrative action. See *Fahey* v. *Mallonnee*, 332 U.S. 245, 250.

The Secretary acted properly in delegating his authority to convene the Boards to his Deputy Chief of Staff for Personnel. Unlike the situation in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (relied upon by petitioners), there is no showing here that Congress specifically considered whether this particular power could be delegated and determined that it could not. 315 U.S. at 366; see also *Wirtz* v. *Atlantic States Construction Co.*, 357 F. 2d 442, 444 (C.A. 5). In the present case the court below correctly pointed out that the matter of personnel reduction was reasonably placed in the hands of the Deputy Chief of Staff in charge of personnel, who acted by order of and in the name of the Secretary (Pet. App. 13a, 35a). Cf. *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 120–122.[3]

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[3] Finally, petitioners' contention that Congress was misled by the Air Force into passing the statute is incorrect and in any event irrelevant. The House Report on the Bill (H. Rep. No. 1406, 86th Cong., 2d Sess., p. 11) makes it perfectly clear that Congress expected the retirement of about "200 colonels and about 500 lieutenant colonels" during the life of the statute. Moreover, the limitation actually placed in the statute was that 80 per cent of the officers considered (after the first Board)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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should be retained. Congress was free to place any other limitation in the statute, and did not choose to do so.

Petitioners' contentions about alleged minor mistakes in the Court of Claims' opinion are wholly irrelevant since no prejudice of any kind is asserted or shown in that connection.

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